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# No Confidence in Non-Confidence Votes: Would the New Zealand Confidence Protocol or Constructive Non-Confidence Restore the Canadian Confidence Convention?

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UNIVERSITY OF CALGARY

No Confidence in Non-Confidence Votes:

Would the New Zealand Confidence Protocol or Constructive Non-Confidence Restore the  
Canadian Confidence Convention?

by

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A THESIS

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## Abstract

Canada's minority governments from 2004-2011 were characterized by hyper-partisanship, constant brinkmanship, and a number of constitutional controversies that raised questions about the state of Canadian constitutional conventions. This led a number of academics to call for constitutional reform, particularly to the confidence convention. Those advocating reform sought an alternative to the Canadian negative non-confidence vote, which typically triggers new elections, and embraced more "constructive" non-confidence votes, which limit the possibility of early elections and promote mid-term transitions. The reformers drew on ideas from New Zealand, whose confidence convention *encourages* constructive non-confidence votes, and from European countries that *require* all non-confidence votes to simultaneously select an alternative government. This thesis assesses the merits and difficulties of importing such models into Canada and concludes that New Zealand's confidence protocol is the preferred choice for Canada.

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Much of this thesis has been a labour of love. Constitutional reform and responsible government in Canada was not my original research topic, but having taken Dr. Rainer Knopff's Public Law class in the my first semester the decision to make the switch was simple: what is more exciting than the constitutional intricacies that transform our constitutional monarchy into a democratic regime? While there are plenty of other fascinating topics, finding a supervisor who is equally passionate about the topics covered in this thesis was a delight. Thank you Dr. Knopff for your guidance, insights, and suggestions for making my work more concise! As well, thank you to Dr. Tom Flanagan and Dr. David Marshall for serving on my examination committee.

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## List of Symbols, Abbreviations and Nomenclature

Abbreviation and Nomenclature	Definition
ACT NZ	ACT New Zealand
AWS	Solidarity Election Action (Poland)
Bundestag	The Federal Republic of Germany's parliament
CDU	Christian Democratic Union (Germany)
CDH	Humanist Democratic Centre (Belgium – Wallonia)
CD&V	Christian Democratic and Flemish party (Belgium)
CiU	Convergence and Union (Spain – Catalonia)
Congreso de los Diputados	Lower chamber, Spain (Congress of Deputies)
Cortes Generales	The Spanish Parliament
CSU	Christian Social Union (Germany – Bavaria)
CVP	Christian People's Party, now the CD&V (Belgium – Flanders)
DEMOS	Democratic Opposition of Slovenia – coalition of parties created to bring democracy and independence to Slovenia
DeSUS	Democratic Party of Pensioners of Slovenia
DP	German Party
DSU	German Social Union
ERC	Electoral Reform Coalition (interest group, New Zealand)
FDP	Free Democratic Party (Germany)
FIDESZ	Hungarian Civic Union (Hungary)
FKgP	Independent Smallholders' Party (Hungary)
FVP	Free People's Party (Germany)
GB/BHE	All-German Bloc/League of Expellees and Deprived of Rights (Germany)
HB	Herri Batasuna (Spain – Basque)
<i>Kanzlerdemokratie</i>	Chancellor democracy – the German conception that the chancellor is the key political actor in the federal republic.
KDNP	Christian Democratic People's Party, Hungarian party
<i>Koordinationsdemokratie</i>	Coordination democracy – the German chancellor facilitates coordination between different government departments
Landtag	State legislature, Germany
LDS	Liberal Democracy of Slovenia – party
LPR	League of Polish Families (Poland)
MDF	Hungarian Democratic Forum
MMP	Mixed member proportional electoral system
MR	Reformist Movement (Belgium – Wallonia)
MSzP	Hungarian Socialist Party
PNV	Basque National Party (Spain – Basque)
PRL	Liberal Reformist Party (Belgium – Wallonia)
PS	Socialist Party (Belgium – Wallonia)
PS	Positive Slovenia – party
PSC	Christian Social Party (Belgium – Wallonia)



PSL	Polish Peasant Party (Poland)
PSOE	Spanish Socialist Workers' Party
Reichstag	The German parliament during the Weimar Republic
SD	Social Democrats (Slovenia)
SDS	Slovenian Democratic Party
Sejm	Lower chamber, Poland
SKD	Slovene Christian Democrats
SLD	Democratic Left Alliance (Poland)
SMP	Single member plurality electoral system
SP	Socialist Party (Belgium – Flanders), now the sp.a
SPD	Social Democratic Party (Germany)
SzDz	Alliance of Free Democrats (Hungary)
UCD	Union of the Democratic Centre (Spain)
UW	Freedom Union, (Poland)
VLD	Open Flemish Liberals and Democrats (Belgium – Flanders)

*“Responsible government is a work in progress.”*

Jennifer Smith (1999: 40)

## CHAPTER 1: INTRODUCTION

The election of a Conservative majority government on May 2, 2011 ended one of Canada's longest periods of minority government (2004-2011). Technically, the longest period occurred between 1921 and 1930, when Canada experienced four straight minority governments. However, the King government from 1926 until 1930 was able to govern as though it had a majority because it could rely on the stable support of eleven Liberal-Progressive Members of Parliament (Russell, 2008: 24). Thus the years from 2004 to 2011 plausibly count as the longest period in which minority governments faced the constant threat of defeat in the House of Commons.

In addition to being uncommonly long, the recent period of minority government was part of an exceptional phenomenon in Canadian politics. Overall, Canada has had a dominant culture of majority, not minority, government. Prior to 1921, there were only two parliamentary parties in federal politics, which meant that only majority governments were possible. Since the advent of third parties in the 1920s, minority governments have occurred with some regularity but have generally not lasted very long. Although Canadians have experienced 13 minority governments in Ottawa since 1921,<sup>1</sup> together they only add up to 24 years.<sup>2</sup> Thus, minority governments have governed for 26 percent of the last 92 years at the federal level<sup>3</sup> and have on average survived for just 22 months. After the run of minorities in the 1920s, the next sustained interval occurred during the 1960s with the Diefenbaker and Pearson minority governments (1962-1968). Between 1968 and 2004, majority government at the federal level was interrupted only briefly by the Trudeau (1972-1974) and Clark (1979) minority governments. A similar trend can be observed in provincial politics, where governments have also tended to be majorities. Nonetheless, there have been notable provincial minority governments like the Peterson

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<sup>1</sup> The thirteen governments are: King (1921-1925, 1925-1926), Meighen (1926), King (1926-1930), Diefenbaker (1957-1958), Diefenbaker (1962-1963), Pearson (1963-1968), Trudeau (1972-1974), Clark (1979-1980), Martin (2004-2006), and Harper (2006-2008, 2008-2011).

<sup>2</sup> Counting from date of formation (or election if the prime minister was the incumbent) until the next election if the incumbent wins or the next date of formation if the government loses power.

<sup>3</sup> If the first party system is added in, then since 1867, minority governments have been in power for 16.5% of the 145 years of Canada's existence. But there was no minority government, other than Mackenzie's in 1873, because Canada had a two-party system prior to 1921. Mackenzie only had a minority government because Macdonald had resigned as prime minister in the wake of the Pacific Scandal and so Governor General Dufferin had no option but to appoint the Liberal leader.

government in Ontario, which survived in power due to the Liberal's accord with the NDP (Russell, 2008: 64).

Clearly, Canada has a strong tradition of majority government at both the federal and provincial orders of government, so much so that majority governments are perceived as the norm while minorities are seen as an aberration, a temporary bump in the road before a lucky party is able to recapture enough support to form a majority government and escape from either the wilderness of the opposition benches or the trenches of minority government. In this context, the 2004-2011 period can be seen as simply the most recent, if somewhat longer-than-usual exception to the majority-government rule.

But that was not how many observers viewed this period. As this most recent spell of minority government was underway, it was widely argued that "hung parliaments," as the British call them, would become more common in Canada (Carty, 2007; Russell, 2008; Cross, 2009; Sears, 2009). Moreover, this prospect was "cheered" (Russell, 2008) as perhaps the best way to challenge the excessive growth of prime ministerial power and the executive's dominance over parliament that had emerged, especially after 1968, from the combination of lengthy periods of majority government and tight party discipline (Savoie, 1999a; 1999b; Simpson, 2001). During the 1980s and 1990s, numerous institutional reforms were proposed to constrain executive power and make parliament more relevant – for example, fixed election dates, enhancing the autonomy and powers of committees, and electing the Speakers through secret ballots (Thomas, 2010: 165; Smith, 2003: 153) – but they have had little effect. As a result, the prospect of more frequent minority government was welcomed as a godsend: in minority circumstances, the government could no longer dominate the House of Commons to the same extent. It would have to take into consideration the priorities and positions of other parties in the House in order to retain confidence, attain supply, and successfully proceed with its legislative agenda. Executive power would be constrained and parliamentary relevance would be assured. Russell, for example, foresaw a greater role for parliament in policy development and maintaining government accountability (2008: 3). Those who took this view often harkened back optimistically to the significant achievements of minority governments in the 1960s and 1970s, believing that minority governments in the new millennium could be just as productive (Sears, 2009: 31).

Unfortunately the experience with minority government in Canada between 2004 and 2011 did not live up to the high hopes that were placed upon it. Although the Martin and Harper minority governments, taken together, lasted for a relatively long period (similar to the King and Pearson minorities), they still proved extremely adversarial and unstable. Even when fixed election dates were enacted in 2007, they proved elusive in the minority context and early dissolution occurred. By the end of the period, disillusionment with minority government and the parties' preferences for partisan politics over constructive legislative debate had become rampant. The three parliaments were labeled as dysfunctional (Chalmers, 2009: 26), childish, low-achievement (Sears, 2009: 31), hyper-partisan, and adversarial to the point of neglecting the public interest (Simpson, 2012; Aucoin, Jarvis and Turnbull, 2011: 207). Journalist Jim Travers commented in the *Toronto Star* during the first Harper minority that "the art of minority government is engineering defeat on the most favourable terms" (2007) rather than actually focusing on any substantive outcomes. Worrying about how to win the next election was paramount and drove partisan dysfunctionality and instability.

As a result, a number of commentators and academics became interested in reassessing the potential of minority government and sought new parliamentary reforms that could lessen executive dominance over the legislature and foster a more thoughtful, constructive, and less adversarial parliament in minority circumstances. In particular, because fixed election dates had proven insufficient to secure the stability of minority governments and to curtail the blatant maneuvering of election timing, reformers sought a way to end the prime minister's virtual right to achieve dissolution through the use of the crown's personal prerogative powers. As long as an election could occur at any time there was no incentive for parties to try to make hung parliaments work, perhaps through mid-term transitions or through more negotiation. Instead, they were predisposed to prefer an election and the prospect of majority government.

By 2011, in other words, many of those who cheered the advent of minority government had become convinced that its potential benefits could not be realized without reform of the confidence convention (Aucoin and Turnbull, 2004; Russell, 2008; Aucoin, Jarvis and Turnbull, 2011). In particular, they seek to replace Canada's tradition of "negative" confidence votes with more "constructive" confidence votes. Whereas negative votes (typical to Westminster systems like Canada) simply withdraw confidence and generally trigger new elections, constructive non-

confidence votes not only deconstruct a government but designate who should form a new one within the existing parliament (i.e., without new elections). For inspiration, the reformers looked first to New Zealand, whose confidence protocol *encourages* but does not require constructive behaviour for non-confidence votes, and then to several European countries such as Germany and Spain, which *require* opposition-led non-confidence votes to be constructive.

Of course, there is no way to avoid minority-government instability entirely. The New Zealand confidence protocol and constructive non-confidence are two measures that can be taken to reduce the uncertainty and ensure that parties cannot resort to threatening an early election to gain the advantage in the House of Commons. Because both of the proposed reforms target the confidence convention of responsible government, they make it more difficult to manipulate and undermine government stability for partisan benefit. The reformers foresee enhanced stability if Canada can only be made to adopt more stringent confidence rules and move away from the negative camp and towards the constructive categories of confidence votes. However, while each of these reforms has garnered its own supporters and detractors, we lack significant examination of the implications of importing the reforms or a comparison of the two reforms to determine which would be a better fit. And it is that gap that is the focus of this thesis.

In the following chapters we will assess the merits of the New Zealand confidence protocol and constructive non-confidence to Canada for stabilizing minority government and explore what might happen if the proposals are imported into the Canadian context. The emphasis is on which of these two reforms would be better for Canada and not on whether Canada must adopt one of these two reforms to the confidence convention. In assessing the two reform proposals, this thesis uses two strategies. First, it looks carefully at how the reforms have fared in the countries that use them. This is particularly important for the constructive non-confidence reform proposal as those academics that have recommended it for Canada have not fully thought out all the implications of grafting it on to Canada's majoritarian Westminster style of parliamentary government. Second, the thesis engages in counterfactual analysis, asking how these reforms would have affected the political controversies about responsible government during the recent period of minority government. Would they serve the purposes that the reformers hoped to achieve? And what might the more general constitutional and political

implications be if these reforms were to be adopted? Counterfactuals explore what conceivably could have happened if some element in an actual situation could be changed. They make it possible to test various hypotheses against the available historical evidence, and work best if the element that is changed does not disturb the historical record too greatly. Therefore, a useful counterfactual experiment replays history in a somewhat different fashion than the normal course of events to determine if a change in the rules would have altered the outcome. Admittedly, counterfactuals cannot provide conclusive results. Yet there remains an important place for such thought experiments (Gerring, 2001: 221-222).

Examining the two reforms through a counterfactual thought experiment and by qualitative research into how they have been used abroad will also provide an opportunity to discern which reform would be a better fit for Canada. As this thesis will show, while constructive non-confidence's comparatively more stringent rules create greater stability compared to the New Zealand protocol, ultimately it is the latter reform that is more appropriate for Canada.

For one thing, constructive non-confidence was devised in response to a critical juncture that has not occurred in Canada: the failure of democracy. Why constructive non-confidence was implemented in Germany matters; the creators of that model desired to stabilize parliament and the executive branch so as to defend the democratic regime against anti-system forces. Given the critical juncture of democratic failure, the German drafters of the Basic Law created institutions that reflect different values than those that underpin the Canadian constitution. The origins of constitutional orders create a "path dependency" that makes them very difficult to change without some event shocking the institution sufficiently to alter its path (Peters, 2005: 20; 71). It is a serious question whether the existing trajectory of the Canadian Constitution has been (or can be) shocked onto the path of constructive non-confidence, especially since that would require difficult constitutional amendments.

This makes the New Zealand protocol a far more achievable reform than constructive non-confidence. The protocol is closer to Canada's Westminster tradition – it was developed in a fellow Commonwealth country – and it does not curtail the system's flexibility. Rather, it encourages parliamentary stability, and thus executive stability, by authoritatively clarifying the conventions of responsible government without codifying them. Significantly, it would not

require constitutional amendments to bring it into existence in Canada. Perhaps most importantly, unlike the New Zealand protocol, constructive non-confidence may in fact perpetuate executive dominance and adversarial politics in Canada, entirely contrary to the aims of the reformers who recommend it.

### **Outline of the Following Chapters**

The first step for this thesis is to explore how the New Zealand protocol and constructive non-confidence came to prominence on the agenda of Canadian institutional reform. How did the advocates for the reform come to the conclusion that reform to the confidence convention is needed, and why did they focus on these two models? This has been briefly overviewed above, but Chapter Two addresses the debate on reform in greater detail, including the controversial political events that precipitated the debate.

The third chapter leaves Canada behind and explores the reforms and their development in their home environments. The chapter recounts how the New Zealand protocol was prompted by the adoption of a new mixed member proportional (MMP) electoral system, and by the role of the Governor General in responding to that reform. There then follows a discussion of the stabilizing effects of the protocol since the first MMP election in 1996. As for constructive non-confidence, the chapter probes what prompted the Germans to create the new type of confidence vote and then why other countries have followed the German example. Also discussed are the experiences other European countries have had with the reform and how well it has stabilized parliament in those countries that have implemented it.

Chapter Four employs counterfactual analysis to replay four Canadian political controversies that occurred between 2005 and 2011 and asks what might have happened had either of the reforms existed in Canada. Of course there is no perfect way to replay events that have occurred with different rules of the game, but a counterfactual thought experiment is the closest way to get the possible impact of the reforms on the constitutional questions that erupted in Canada during the recent minority governments. The chapter finds that constructive non-confidence would have been far better at guaranteeing stability during the four events analyzed because it has more stringent confidence requirements than the New Zealand protocol, which relies on constitutional convention and on the good faith of the relevant political actors.



Although this might indicate that constructive non-confidence is the direction Canada should be heading it, the next chapter suggests otherwise by broadening the thought experiment.

The fifth chapter examines both reforms and what the implications of the reforms might be in Canada to determine which reform would be a better choice for Canada. Using an historical institutionalist lens, the chapter starts with the institutional junctures that occurred in New Zealand and in Germany and Spain to probe whether Canada has hit a critical juncture sufficient for the reforms. From this analysis it is clear that Canada has not experienced the turbulence that has rocked Germany and Spain, which suggests that Canada lacks the proper motivation for constructive non-confidence. Instead, the New Zealand protocol is a far more practical reform given the Canadian constitutional structure. The second half of the chapter is narrower in focus and considers whether the reforms will deliver the results expected of them and if not, what the implications of adopting the reforms might be. To determine this, the chapter once more returns to the experiences of the reforms in the case studies of New Zealand, Germany, and Spain.

Compared to countries like Germany and Spain, Canada's stable parliamentary democracy has evolved over time to accommodate changing expectations. Responsible government and the confidence convention have never been codified, let alone entrenched. Instead, it is far more reasonable to expect future reforms to be more in the direction of the New Zealand confidence protocol, which is drawn from the same evolutionary constitutional model. The stringent rules of constructive non-confidence may offer greater security against politicians manipulating the constitution for their own benefit but the practicality of reform pulls Canada towards the New Zealand path. Moreover, as the following chapters unfold, we are faced with the question of the unintended consequences of importing the reforms, particularly regarding constructive non-confidence. Those academics in Canada who have cheered the two reforms have neglected a thorough investigation of their broader impacts. It is this omission that this thesis aims to remedy.

## CHAPTER 2: RESIGNATION RULE REFORM IN THE CANADIAN CONTEXT

Polling data in Canada consistently indicate that Canadians are cynical and distrustful of politicians and have little respect for the House of Commons (Docherty, 2005). Canada's elected legislative chambers, including the House, no longer appear to be effective in carrying out their four essential functions: forming and legitimizing government; giving government the authority to work and communicate citizen's preferences; holding government accountable; and engineering a mid-term change of government if confidence is lost (Franks, 1987: 5). Instead, legislative assemblies have become increasingly dominated by first ministers and cabinets – that is, by the very “governments” they are supposed to hold accountable. In particular, assemblies have little practical influence in forming or changing governments, especially in majority government circumstances.

The trend of prime ministers governing from the centre and building a court of loyal supporters to carry out their wishes has been well documented by Savoie (1999a; 1999b) among others (for instance, Pelletier, 1999; Bakvis, 2000; Simpson, 2001; Aucoin et al., 2011). The strong party discipline that is evident in Canadian legislatures furthers the prime minister's ability to govern from the centre because it ensures that the caucus remains focused on implementing the government's agenda. The prime minister's powers to appoint and assign various positions, demote MPs from those positions, or even remove MPs from caucus are powerful tools for keeping the party troops in line. The growth of executive dominance surely helps to explain the public's cynicism about elected parliamentary assemblies.

Long a central concern for analysts of Canada's parliamentary system of government, executive dominance has been the target of numerous institutional reform proposals. Reforming parliamentary committees (Dobell, 2000; Smith, 2003; Docherty 2005), expanding the size of the House of Commons (Franks, 1987; Docherty, 2005; Aucoin, 2006), holding more free votes, relying more on the tools of direct democracy (citizen initiatives, referendums, recalls) (Reform Party, 1996; Strahl, 2001), fixing election dates (Milner, 2005; Russell, 2008), and reforming the Senate (Bakvis, 2000) – all these and more have been promoted as ways of constraining the ever growing power of first ministers and cabinets.

Recently, as we have seen, minority government has been added to the list of antidotes to executive dominance, especially as it seemed that such governments might become more common. Thus, at the beginning of the recent period of minority government, observers welcomed the change, believing that it would limit the ability of the prime minister and the executive to dominate parliament as they could not depend on a reliable legislative majority (McCandless, 2004; Thomas, 2007; Russell, 2008). Yet, the three hung Parliaments between 2004 and 2011 did not live up to expectations. In fact, executive dominance remained a problem and party discipline was, if anything, strengthened by the constant parliamentary instability because every vote became crucial for party leaders seeking to advance their agenda (Chalmers, 2009: 31-33; Sears, 2009; Aucoin et al., 2011: 14-17; 71).

As a result, the reform of parliament in minority circumstances was added to the reform agenda generated by the dominant tradition of majority government. At the heart of this new reform agenda were the conventions of parliamentary responsible government that govern the prorogation and dissolution of parliament. Analysts worried that minority prime ministers could too easily prorogue or dissolve a parliament that was attempting to hold the government to account. This meant that “engineering a mid-term change of government if confidence is lost” – one of the four functions of elected parliamentary assemblies (Franks, 1987: 5) – was nearly as unlikely in minority circumstances as it was under majority governments (Aucoin et al., 2011: 57). Reformers proposed to address this issue by bringing to Canada either a version of the New Zealand confidence protocol or a European-style constructive vote of non-confidence. This chapter provides context for those proposals in Canada, starting with a discussion of the principles and conventions of parliamentary responsible government.

### **Responsible Government**

While Canada has a formal written constitution, the entire constitution is in fact composed of three parts: the formal constitutional documents, the legal rules relating to the three branches of government, and the conventions or informal rules that have developed through the practice of parliamentary government (Heard, 1991: 1). It is this third component of conventions that is our focus.

Marshall and Moodie (1959) define constitutional conventions as the “rules of constitutional behaviour which are considered 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” (cited in Heard, 1991: 3). According to the Supreme Court of Canada, the role of such conventional rules is to “ensure that the legal framework of the constitution will be operated in accordance with the prevailing values or principles of the period” (*Re: Resolution to Amend the Constitution*, 1981: 880). Thus, in Canada’s parliamentary system of government, it is the conventions of responsible government that transform what is formally a constitutional monarchy into a democratic regime. According to the written constitution, for example, all of the executive power falls under the prerogative of the crown, but it would certainly not be “in accordance with” the democratic “values or principles” of Canadians for the crown’s representative to exercise the full executive power at his or her discretion. Hence, the principles and conventions of responsible government ensure that – with the exception of a few “reserve powers”<sup>4</sup> (discussed below) – the governor general exercises the crown’s powers only on the advice of the prime minister, who along with the cabinet forms the effective executive or “government.”<sup>5</sup> The government, in turn, is able to advise the governor general only because it holds the confidence of the House of Commons. As the House of Commons is the only democratically elected body at the federal level, the democratic nature of Canadian government rests on the constitutional convention requiring that the government (prime minister and cabinet) be drawn from parliament and that it must maintain the confidence of parliament’s elected chamber (the House of Commons).

The general confidence convention also entails rules concerning the individual and collective ministerial responsibility of ministers. Individual responsibility ensures that ministers are responsible for their departments and their own personal activities, while collective

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<sup>4</sup> The reserve powers or personal prerogative of the crown are powers that the crown’s representatives are within their right to exercise without prime ministerial advice. These include the ability to appoint and dismiss the public servants, summon parliament, prorogue parliament, and dissolve parliament. They are narrower than the crown prerogative which covers the general working of cabinet government and the transfer of power from the crown to efficient executive for the purpose of the public good and governance (Smith, 1995: 32-34).

<sup>5</sup> It is worth noting that the governor general must always have a prime minister to advise him or her on the use of the executive powers. This convention ensures that the governor general cannot undermine responsible government and the democratic principle. Therefore, when King resigned in 1926 he precipitated the mid-term change of government to Meighen because he left Governor General Byng without a government (Forsey, 1968: 204).

responsibility is the responsibility of the cabinet as a whole for the government's performance. In both cases, ministers are accountable to the "legislature for their actions and must resign if the legislature loses confidence in their performance" (Heard, 1991: 50-51).

According to Heard, the confidence convention is the foundation of responsible government, though it remains entirely in the realm of convention. It "gives parliamentary responsible government its most essential character," namely that "the political executive is theoretically exposed to the continual threat of removal by the legislature" (Heard, 1991: 68). The governor general can thus rest assured that in exercising the crown's power, he or she is responding to a legitimate, democratic government. In short, the confidence convention ensures that the government is responsible to the people's representatives and through them to public opinion (Smith, 1999: 40-41).<sup>6</sup>

Three types of confidence tests have evolved over time to test whether the government still maintains parliament's confidence. The first type is the most clear: a vote that the government designates publicly as an explicit test of confidence. Second, certain key votes on broad government policy, such as the address in reply to the speech from the throne or the main budget and supply motions, are always considered confidence votes even though they are not explicitly framed as such. Both of these are confidence votes rather than non-confidence because they are initiated by the cabinet. It is the third type, the non-confidence vote, which is generally initiated by opposition but could include motions from government backbenchers. These non-confidence motions are phrased in such a way as to condemn the government and demand its resignation (Heard, 2007: 412).

Although the confidence convention is key to responsible government, it tends not to be in the spotlight during periods of majority government. Majority prime ministers do not need to concern themselves with the opposition's introduction of non-confidence motions since they have the parliamentary strength to defeat any such motion. The same is true for budget bills and

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<sup>6</sup> The modern notion of responsible government is the legacy of Britain's supposedly golden age of parliament that lasted from the Reform Act of 1832 to the Reform Act of 1867. During the period, confidence was always in question and the House of Commons used its power to control government. The golden age was brought to an end by politicians who sought to escape the instability of fragmented parliaments through the creation of organized and disciplined parties: the golden age was characterized by no government ever serving for the full parliamentary term (Heard, 1991: 68-69). The British North American colonies were granted responsible government during this time period, making responsible government the de facto system for Canada in 1867.

other legislation that is central to the government's agenda. It is only in minority government circumstances that confidence becomes a pressing issue, and confidence has been lost by minority governments only six times at the federal level.<sup>7</sup> Given the strong tradition of majority government in Canada, it has been easy for Canadians to forget the confidence convention and the different types of confidence and non-confidence votes. Indeed, the arcane intricacies of responsible government do not regularly confront the Canadian public and its elected representatives, and when they do, they quickly recede into the background as the dominant tradition of majority government reasserts itself.

One might expect this to change with a lengthy and sustained period of minority government, especially when it seemed that this might become the more usual pattern. That is precisely what happened during the extended period of minority government from 2004 to 2011, when the central principles and conventions of responsible government became the objects of considerable attention and controversy. The first instance of this occurred on September 9, 2004. Harper, Layton and Duceppe released a letter in which they set out their collective views on the minority government context to Governor General Clarkson (Aucoin et al, 2011: 61). They advised her pre-emptively – the first session of the 38th Parliament was not due to start until October 4, 2004 – that their parties did not believe that a new election was necessary should the government be defeated early on in the session (De Souza, 2011). Because they call on her to consider all of her constitutional options before agreeing to a dissolution, the joint letter highlights that all three of the opposition parties believed in the possibility of a mid-term transition. At the time, this position was less controversial and in fact it is the pre-emptive nature of the letter that remains controversial. Because governor general should only heed the advice of the prime minister unless confidence comes into question, it was arguably improper for the opposition parties to approach Governor General Clarkson directly with unsolicited advice.

Even so, the letter indicates that at the outset of the recent period of minority government, it appeared that the political elite believed mid-term transitions were constitutionally and democratically legitimate and that the prime minister could not automatically expect the governor general to accede to dissolution advice. This position, adopted as it was prior to the

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<sup>7</sup> Confidence was lost by the governments of Meighen (1926), Diefenbaker (1963), Trudeau (1974), Clark (1979), Martin (2005) and Harper (2011).

opening of parliament in 2004, came into question as the minority period unfolded as it became clear that both politicians and the public all held differing views on the operation of responsible government and its conventions.

This thesis focuses on four episodes, one of which occurred under the Martin government in 2005 while the other three were generated by the Harper government. The rest of this chapter briefly introduces the four controversies and shows how they contributed to the unravelling of the consensus surrounding constitutional conventions and led to the proposals to bring to Canada either the New Zealand confidence protocol or European-style constructive non-confidence. Chapter Four will return to these controversies in more detail as it asks, counterfactually, how the two proposed reforms might have affected the issues and outcomes in each of the controversies.

### **The May 10, 2005 Confidence Vote**

The first major controversial event during the 2004-2011 period of minority government was a May 10, 2005 vote that revealed a lack of consensus amongst politicians and commentators about how to define those non-confidence votes that fall into third category of confidence votes – those initiated by the opposition to condemn the government and state the House's loss of support. The vote was on a motion to amend another motion instructing the Standing Committee on Public Accounts to amend its report to include the following statement: "that the Government resign because of its failure to address the deficiencies in governance of the public service addressed in the report" (Canada, House of Commons, 2005 cited in Aucoin et al., 2011: 96). The House of Commons passed this motion, and the opposition parties believed they had defeated the Liberal government on an explicit non-confidence vote. The Liberals, however, contending that the vote had merely been on procedural matters, refused to acknowledge it as sufficiently substantive to constitute a legitimate withdrawal of confidence (Heard, 2007: 402-403).

The government was heavily criticized for its stance but it persevered and managed to survive until the matter could be settled on May 19 with the vote on the budget bill, which everyone knew to be a confidence vote. During the short interval between the two votes, the government was able to convince Conservative MP Belinda Stronach to cross the floor and join

the Liberal cabinet and to curry independent MP Chuck Cadman for support – just enough for the Liberals, backed by the NDP, to draw even with the combined strength of the Conservatives and the Bloc Québécois. The question of confidence was resolved when the Speaker of the House of Commons broke the tie and sided with the government on May 19, 2005 to pass the budget. Though the government forged on through the summer and fall, it was finally defeated on November 28, 2005.

The May events illustrated how confidence is a sufficiently fluid concept for a single defeat to be reversed: a government that has seemingly lost confidence can regain it and thus remain in office unless it continually suffers defeats (Desserud, 2006: 16). This event adds weight to the evolving notion that a single defeat on a confidence measure need not unseat a government if it can regain confidence within a short period of time (Desserud, 2006: 16). A previous example of such a confidence turnaround is a maneuver by the Pearson government in 1968, when it was defeated on a tax bill. After a short adjournment during which the government negotiated with some of the opposition, it introduced a motion of confidence which the House passed (Heard, 1991: 71).

The May 10, 2005 vote generated a short-lived public debate on how confidence votes are defined, a debate that at its narrowest focus asked whether non-confidence votes could come from procedural motions and at its broadest point questioned whether reform to the confidence convention is needed. Though the public debate soon declined, and was left to academics to continue, it would later be picked up with the 2008 constitutional crisis and the more general discussion of the lack of consensus on responsible government's fundamental conventions.

### **The 2008 Early Dissolution and the Virtual Right of Dissolution**

If the May 2005 confidence hullabaloo displayed the lack of consensus about the conventions of responsible government in minority government circumstances, events under the first Harper government sharpened and intensified the issues. In particular, serious questions arose about the extent of the prime minister's power over the dissolution and prorogation of parliament. Or, to put it the other way around, the questions concerned the extent of the governor general's "reserve powers" with respect to prorogation and dissolution. Although the general norms of responsible government require the governor general to accept the advice of a prime



minister who enjoys the confidence of the House of Commons, it has been widely accepted that the governor general retains some “reserve powers” to act on his or her own discretion to protect the democratic principle inherent to responsible government. Therefore, the reserve powers come into play when it is unclear that a sitting prime minister continues to enjoy confidence, and perhaps even in legislatively defined circumstances when the government continues to enjoy confidence. It was, in fact, new legislation – the fixed election date legislation passed by the Harper government in 2007 – that first brought these issues to a head for the Conservative government. The controversy arose in 2008 when Harper successfully requested dissolution and new elections prior to the election date set by the fixed-date law. Could Harper legally make this dissolution request? Should Governor General Jean grant it?

Fixed election dates had been a perceived answer to the democratic deficit: they had been proposed to create certainty about the timing of the next election for voters who do not like going to the polls too often; introduce more fairness and decrease the adversarial characteristic of Canadian politics that many Canadians dislike; and help restore confidence in the democratic process by ensuring that prime ministers were restricted from calling an election whenever it suited them (Milner, 2005). The restriction on prime ministerial power was designed in part to address executive dominance by taking away the virtual right of the prime minister to the prerogative power of dissolution. Assuming that a prime minister respects the fixed-date legislation, then some of the executive’s dominance would be reduced (Aucoin and Turnbull, 2004; Desserud, 2005).

Partisan fairness was another intended benefit of the fixed-date legislation. At least in majority government circumstances – i.e., in the circumstances of Canada’s traditional executive dominance – the prime minister traditionally held all of the power over election timing while the opposition held none. It was hoped the new fixed-date law would achieve greater symmetrical balance between the government and opposition so that neither would have any partisan advantage regarding the timing of elections. Again, this assumed that the prime minister would respect the law.

In minority government circumstances, of course, there had always been more partisan symmetry and thus more fairness with respect to election timing. In minority governments, the prime minister traditionally retained the discretion to call snap elections, but this was matched by

the power of the opposition to also trigger early elections by defeating the government. While this was not as unfair as the asymmetrical discretion that existed under majority governments, it was certainly unstable. Thus it was hoped that fixed-date legislation might help stabilize minority governments, assuming that both the prime minister and leaders of the opposition parties respected the spirit of the law (Russell, 2008: 134).

Each of the previous three paragraphs emphasized need for the prime minister to respect the fixed-date legislation and the last of those paragraphs also underlined the need of opposition leaders to do the same. But why highlight the need to respect the law by these political actors? Should we not assume that relevant actors will obey the law, and that the courts will come to the rescue if they do not? In fact, respect is absolutely central to the success of this particular legislation. This is because the fixed-date legislation does not restrict the governor general's prerogative to dissolve parliament at a time of his or her choosing. The governor general's personal prerogative powers over such matters as dissolving parliament cannot be changed except through a constitutional amendment gaining the consent of the federal parliament and the legislatures of all of the provinces.<sup>8</sup> To avoid this constitutional minefield, the first clause of *An Act to Amend the Canada Elections Act* (2007) – the fixed-date law – states that “nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.” Hence, the legislation begins with a loophole that allows for an early dissolution if the governor general agrees regardless of the fact that the legislation fixed the election date to October, 2009 and then every four years subsequently. With this loophole, a prime minister (whether in majority or minority circumstances) can advise an early election – although proffering such advice is against the spirit of the legislation – and if the governor general accepts the early election advice, he or she can dissolve parliament without breaking the fixed election date legislation. Similarly, a governor general can call an early election in minority circumstances if the opposition defeats the government and there exists no willing and viable alternative government that can command the confidence of the Commons.

Therefore, the fixed-date legislation does not enforce legally binding election dates upon government. Rather, most commentators agree that the legislation was intended to create a

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<sup>8</sup> Section 41(a) of the *Constitution Act, 1982* is the so-called unanimous amending formula. It states that any amendment to the office of the Queen, the governor general, or the lieutenant governors can only be made if resolutions are passed by the Senate, House of Commons, and each provincial legislature (Canada, 2014).

constitutional convention that discourages the prime minister from proffering dissolution advice to the governor general (Russell, 2008: 139; Heard, 2010: 138) and that encourages opposition leaders to vote more “constructively” when defeating the government – i.e., to defeat a government only when they are prepared to replace it until the legally scheduled election date (Russell, 2008: 142). The creation of such a constitutional convention against early elections is central to the success of the legislation; as Heard notes, the legislation was so dependent on convention that without it, the law is essentially unenforceable (2010: 129). However, since the development of such a convention could only occur through the relevant actors choosing to abide by the fixed election dates, it never came to fruition. As we shall see in more detail in Chapter Four, opposition leader Stéphane Dion did not see the legislation as imposing any constraints on him. Indeed, he effectively claimed that the law had transferred discretion over electoral timing to him from the Prime Minister (“Hook, Line, Election?,” 2008). Harper responded in kind, beating Dion to the punch by exploiting the statute’s legal loophole and successfully securing an early dissolution on September 7, 2008, more than one year before the set date. That the fixed-date law would have no effective application under minority governments was subsequently confirmed when the opposition defeated the Harper government and triggered an early election in 2011. Those who wished to stabilize minority government clearly could not rely on fixed-date legislation alone. In looking for other, or at least additional, solutions, they focused on the New Zealand confidence protocol and on European-style constructive non-confidence (Russell, 2008; Aucoin et al., 2011).

### **The Constitutional Crisis of 2008**

Soon after the “early” 2008 election, in which the Conservative government was re-elected with an enhanced minority, the confidence convention itself became the centre of controversy. The issue was what happens when confidence is lost or looks like it may be lost. This issue had two conceptually different dimensions. First, what happens if confidence is clearly lost? Must the governor general grant the prime minister’s request to dissolve parliament and hold new elections or can he or she appoint a willing and viable alternative? Second, can the prime minister delay an imminent vote of non-confidence by proroguing parliament or should

the governor general refuse such a request? In other words, the constitutional crisis of 2008 concerned debates about the appropriate circumstances for both dissolution and prorogation.

Both issues arose because, very soon after the Harper Conservatives had been re-elected in 2008 (as another minority government, but with an enhanced plurality), the opposition parties declared their intention to defeat the government and replace it, without new elections, with a coalition government. The official coalition would be composed of only the Liberals and the NDP, but the Bloc Québécois had promised support on confidence matters. Harper insisted that it would be democratically illegitimate for the coalition to replace his government without holding new elections, and that he would therefore ask the governor general for dissolution if his government was defeated. First, however, he delayed the confidence vote by visiting the Governor General on December 4, 2008 and successfully asking her to prorogue Parliament until January 26, 2009. The delaying tactic worked. The coalition fell apart and did not defeat the government. As noted above, the government was eventually defeated by the opposition parties in 2011, prior to the next scheduled fixed election date, but in 2011 the opposition clearly wanted to trigger new elections, whereas in 2008 they wanted to replace the government. Had the threatened 2008 non-confidence vote actually occurred, it would have functioned as a “constructive non-confidence” vote. In the rest of this section, I sketch out in further detail the debate about the “dissolution” and “prorogation” dimensions of the constitutional crisis of 2008.

#### *The Dissolution Debate: Coalition or Election*

Even though a mid-term transition of power to the proposed coalition became moot by the end of the prorogation period, its hypothetical legitimacy – i.e., the assertion that the House of Commons could engineer “a mid-term change of government if confidence is lost” (Franks, 1987: 5) – generated vigorous debate. Andrew Potter labeled the two sides in this debate “parliamentarians” and “democrats” (2009: 4).

The parliamentarians, such as Russell (2009b), Weinrib (2009), Smith (2009), and Skogstad (2009), maintained that parliament makes governments through the confidence convention, and can thus unmake or change them. From this perspective, mid-term changes in government without elections are fundamentally legitimate. Some of the parliamentarians concede that Canadian practice has established a need for new elections once a parliament has

persisted beyond an early start-up period – often defined as beyond about six months and a reasonable attempt to get through the first session – but insist that mid-term transitions are both legitimate and desirable during the very early stages of a parliament’s life (Forsey, 1968: 261-265; Russell, 2008: 22). In this early phase, the government should do its utmost to pass supply and if the House does lose confidence, the governor general’s responsibility is to form a new government to avoid going back to the electorate very closely on the heels of the previous election (Forsey, 1968: 262). A steady “diet of elections” until voters tire of them and return a majority government is unacceptable, in this view. Accordingly, because the coalition emerged as a viable alternative government so soon after the 2008 election, the Governor General would have been right to appoint it rather than dissolve Parliament if it had actually defeated the government.

In contrast, Potter’s “democrats” – for example, Tom Flanagan (2008; 2009), Michael Bliss (2008a; 2008b; 2008c), and Potter himself (2009) – believe that it would have been democratically illegitimate for the coalition to take power without new elections giving it a mandate to do so. This perspective emphasized the fact that coalition members had actively campaigned against the idea of a coalition in the just completed election. If parties clearly reject coalitions during an election campaign, argued Potter, they should not turn around and form a coalition after the fact (2009: 3-4). The democrats also underlined the fact that although the coalition did not officially contain the Bloc Québécois, it depended on that party’s negotiated stable support. From their perspective, the ongoing influence of this anti-system party on the government is also something that voters must have the opportunity to endorse or reject in an election. Polls showed that many Canadians agreed, especially in Western Canada where citizens were predominantly anti-coalition and felt that voters must have a say on the coalition (Skogstad, 2009: 169).

Potter’s democrats were often portrayed by their parliamentary opponents as taking an absolutist “elections only” view of governmental transition in Canada’s parliamentary system – i.e., that *every* defeat of a government must lead to new elections, or that mid-term governmental transitions without elections are *never* legitimate (Russell, 2009a: 141). That view is mistaken. Flanagan, for example, has clearly stated that a governor general should “normally” appoint a viable and willing alternative government very early on in a parliament’s life rather than call new

elections (Knopff and Snow, 2013; Flanagan, 2008). In his view – and in that of Bliss and Potter – it is the circumstances of *this particular* coalition, especially its Bloquiste support, that requires the otherwise abnormal step of very early new elections. Flanagan is clear, moreover, that if those new elections – this time with the coalition option clearly on the table – returned yet another Conservative minority, the coalition could legitimately defeat and replace it without yet more elections (Flanagan, 2008). In short, the gulf between the “democrats” and “parliamentarians” may not be as wide as is sometimes suggested (see Knopff and Snow, 2013: 20-21).

There was, of course, a substantial gulf between those who thought that *this particular coalition* was a perfectly acceptable candidate for early mid-term transition without elections and those who thought new elections were necessary at least in this case. That disagreement, as we shall see in Chapter Four, might also influence one’s assessment of the two major institutional reforms under consideration in this study: the New Zealand confidence protocol and constructive non-confidence requirements.

### *The Prorogation Debate*

The prorogation debate of 2008 was closely tied to the question of “coalition vs. election” because prorogation delayed and ultimately derailed the coalition. Had Governor General Jean refused prorogation, the opposition would likely have defeated the government and the issue of whether she should then appoint the coalition or call new elections would not have been at all hypothetical. Like the issue of “coalition vs. election,” moreover, the prorogation debate involved the question when it was legitimate for the governor general to use reserve powers to refuse a prime minister’s advice.

On one side of the prorogation debate are those who believe the Governor General made the right decision in granting Harper’s prorogation request (Hogg, 2009; Franks, 2009; Potter, 2009; Macdonald and Bowden, 2011) while commentators on the other side of the argument feel that it was the wrong decision because they question the precedent being set (Heard, 2009; Cameron, 2009; Weinrib, 2009; implicitly Russell, 2011). Starting with the authors who support the 2008 prorogation, it is clear that there is significant disagreement among them. Hogg, the special constitutional advisor present at Rideau Hall during Harper’s visit to request prorogation

on December 4, 2008, posits that it was the right choice for parliamentary government and its stability. It was reasonable for Her Excellency to conclude that the Bloc-supported Liberal-NDP coalition would be an unstable government, an unfortunate path given the looming economic storm clouds, and so a cooling down period for the House was the preferable choice (Hogg, 2009: 200). Franks (2009) agrees with much of Hogg's reasoning but adds that the main concern for the Governor General should be for the neutrality and reputation of her office. Franks hypothesizes that if prorogation had been refused, Harper and the Conservatives would have directed their rhetoric at Madame Jean and the crown, claiming that she was, like the coalition, one of the enemies of democracy in Canada (2009: 45). By granting prorogation, Governor General Jean protected the political neutrality of the crown.

The kind of democratic principles used to argue that new elections would be necessary in the event of the government's defeat were also used to defend and justify the Governor General's prorogation decision. Potter, though it is mostly implied in his 2009 article, agrees that the coalition would have been illegitimate and that Madame Jean was upholding her constitutional duty to protect the democratic principle by proroguing the 40<sup>th</sup> Parliament. Macdonald and Bowden (2011) go even further, maintaining that democracy and responsible government had stripped away the crown's discretion with respect to prorogation altogether. In other words, unlike those who maintained that the Governor General had used her discretion wisely, Macdonald and Bowden read the relevant precedents for prorogation as meaning that governors general no longer have any discretionary reserve powers with respect to prorogation.

Russell (2011) rejects Macdonald and Bowden's assertion of no discretion for the governor general with respect to prorogation. He stresses that academics (for instance, Hogg, 2009 and Heard, 2009) still find that the constitution allows for the crown's reserve-power discretion in certain situations, for instance when intervention is needed to protect the proper democratic functioning of parliament (Russell, 2011: 19). While Russell does not directly say that he disagrees with the prorogation decision, given his view that the coalition was a perfectly legitimate move within a parliamentary democracy (2009a: 141), it seems likely that he would have supported the refusal to grant prorogation. He stops short of endorsing the coalition because of economic turmoil in the fall of 2008, writing that "I think most Canadians, including many NDP and Bloc voters, did not want a political eruption in Ottawa at a time when Canada, and the

world, are facing a serious economic crisis” (Russell, 2009a: 147). However, he shares Franks’ (2009) concern that the rules of the game are not clear, and thus it is important to come to a consensus on constitutional conventions so that the governor general is not forced to make political decisions (Russell, 2009a: 208).

Andrew Heard (2009) clearly believes the governor general has reserve-power discretion over prorogation and provides perhaps the most explicit condemnation of the way she used that discretion in this instance. Heard concludes that the 2008 prorogation set a “perilous precedent” that does more harm than good to responsible government in Canada (2009: 51). His position is backed by Cameron (2009) and Weinrib (2009). All three authors bemoan a precedent suggesting that a government under threat can escape having to resolve the issue of confidence by asking for the prorogation of parliament. In their view, the Governor General should have used her reserve-power discretion to refuse the prorogation advice; allowing the 2008 prorogation prevented Parliament from functioning and threatened responsible government (Heard, 2009: 57).

Heard writes that the event sets the precedent for “any future prime minister to demand that Parliament be suspended whenever he or she feels threatened with defeat” (2009: 60). Accordingly, prorogation is now a tool for the prime minister to use in order to break the opposition’s resolve and the precedent set by Madame Jean’s decision opens up further exploitation of constitutional principles in the future (Heard, 2009: 60; Weinrib, 2009: 74). Interestingly, the precedent has already experienced some fallout. In 2009, when Harper had Parliament prorogued once more to cut off a parliamentary committee’s inquiry into government conduct regarding Afghan detainees, the expectation that the Governor General would acquiesce to the request was such that Harper did not even bother to visit Her Excellency in person but merely picked up the telephone (Hicks, 2010: 22). For some observers, Harper had successfully followed the example of previous prime ministers who have desired to take on the crown’s personal prerogatives for their own use (Hicks, 2010: 22). For Russell (2009a), the precedent contributes to a growing lack of consensus about the crown’s reserve-power discretion. This is unfortunate, argues Russell, because without clear guidelines for the use of the prerogative powers any decision taken by the governor general can be framed as political intervention.



## **Responses to the Crumbling Consensus on Constitutional Conventions**

Whatever side one takes in the substantive debates outlined above, it is surely difficult to quarrel with Russell's claims about the lack of consensus surrounding the fundamental constitution conventions of responsible government. Should the governor general grant a prime minister's early dissolution request despite the existence of a fixed election date law? What about the opposition's ability to trigger early elections in opposition to the spirit of such a law? If fixed-date laws do not work in minority government circumstances in part because the opposition retains its power to engineer an "early" defeat of the government, what counts as a non-confidence vote that actually achieves such defeat? If and when a government is clearly defeated, under what circumstances should (or must) the governor general grant a prime minister's request for dissolution and new elections, and under what circumstances, if any, can (should) the governor general appoint an alternative government? These questions have all been hotly debated in recent years.

Some of these questions have, of course, been answered as a matter of practice. In particular, we know that the prospects of fixed-date laws, having failed the critical initial tests, are not at all good in minority governments. We also know that minority governments can delay and perhaps thereby derail imminent non-confidence votes. Because of the success of the latter strategy, we do not yet know whether a governor general would appoint the kind of alternative government represented by the 2008 coalition without a new election. Those who dislike the practical answers we have thus far received, and who worry about the questions not yet answered, have been searching for reforms that would yield a clearer system of responsible government and one more to their taste. They have mostly zeroed in on the two reforms that constitute the focus of this thesis: the New Zealand confidence protocol and constructive non-confidence.

### *The New Zealand Confidence Protocol*

The New Zealand protocol is composed of certain sections of that country's "Cabinet Manual," which address government formation, mid-term transitions and early elections.<sup>9</sup> The

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<sup>9</sup> It is worth noting that the recognition of these sections from the Cabinet Manual as the "New Zealand protocol" is a Canadian construct, first found in Aucoin and Turnbull's 2004 article.

protocol explains that after a successful non-confidence vote, the New Zealand government is expected to present its resignation to the governor general who will accept it only if there is an alternative government possible. That is, if an alternative government is possible, the governor general will accept the defeated government's resignation and appoint the alternative without new elections. If it turns out that the governor general can find no willing and viable alternative government, however, he or she will dissolve parliament and call new elections. In this circumstance the governor general will not accept the incumbent government's resignation, because a government must remain in place during the electoral period. The Cabinet Manual also requires the defeated, incumbent government to act only in a "caretaker" capacity during the elections. Because dissolution and elections are a possible outcome of a non-confidence vote, the New Zealand protocol clearly does not entail a requirement of "constructive" non-confidence. Just as clearly, however, the protocol underlines the default legitimacy of a mid-term governmental transition without new elections, and to this extent can be said to encourage constructive voting.

Importing the New Zealand protocol to Canada was first proposed in 2004 by Aucoin and Turnbull in response to the possibility of electoral system reforms then being considered by some provinces. The proposed reforms would have moved away from Canada's traditional first-past-the-post electoral system to more "proportional" systems of representation. Knowing that the result of such reforms was likely to be more frequent minority or hung parliaments, Aucoin and Turnbull sought ways of creating greater parliamentary stability in such circumstances. Understanding the likely inability of fixed-date laws to achieve such stability on their own, Aucoin and Turnbull turned to New Zealand, which had developed its confidence protocol in response to the same kind of electoral reform being considered by some of the Canadian provinces. They argued for the need to remove the virtual right of dissolution that first ministers have assumed over time because a defeated prime minister should not have the automatic right to an early dissolution, especially if there is an alternative government possible.

While the electoral system reform that concerned Aucoin and Turnbull never occurred in Canada, their proposal for adopting the New Zealand confidence protocol was revived for different reasons by Peter Russell in his 2008 book, *Two Cheers for Minority Government*. Russell saw the New Zealand Protocol as a way to stabilize minority government. Indeed, he

suggested that in the Canadian context the New Zealand protocol combined with fixed election dates could effectively encourage politicians to be constructive in voting non-confidence. With fixed election dates, MPs should indicate an alternative government if the incumbent government is defeated (Russell, 2008: 150), something the New Zealand protocol would further underline. With both fixed-date legislation and the New Zealand confidence protocol in place, Russell hoped that politicians would not risk the wrath of the electorate by going to the polls early, especially if an alternative government was available to replace an incumbent administration that has lost confidence (Russell, 2008: 150; 142)

Certainly, fixed-date legislation by itself is not enough, as the early elections of 2008 and 2011 have shown. After the 2008 election and constitutional crisis of that year, Russell (2009b) and others (e.g., Harland, 2011; Russell and Milne, 2011; Hicks, 2012; Public Policy Forum, 2012) have continued to emphasize the need to rebuild the consensus on a number of fundamental constitutional conventions, including legitimizing mid-term governmental transitions through the kinds of confidence protocols pioneered by New Zealand. For some authors, however, the New Zealand protocol seems insufficient because it rests content with *encouraging* rather than *requiring* constructive non-confidence votes. The idea of a constructive non-confidence requirement has thus emerged on the agenda of Canadian constitutional reform.

### *Constructive Non-Confidence Requirements*

The requirement that non-confidence votes be “constructive” exists in a number of countries, including Germany, Spain, Belgium, and Hungary. Russell discusses this model as an option for Canada but ultimately passes on it, preferring the New Zealand protocol plus fixed-dates because the latter option provides for constructive voting while remaining within Canada’s Westminster tradition (2008: 150). However, the constructive non-confidence requirement has gained support from Aucoin, Jarvis and Turnbull. In *Democratizing the Constitution*, they propose that all non-confidence votes must be constructive within the parliamentary term set by fixed election date legislation – i.e., a non-confidence vote must establish a viable alternative to the defeated government. Unlike the New Zealand confidence protocol, which involves only the adjustment of constitutional conventions, the kind of constructive non-confidence proposed by Aucoin, Jarvis and Turnbull requires constitutional amendment. This is so because the

discretionary prerogative power of the governor general to dissolve parliament at any time must be removed (making fixed election dates legally binding), and, as we have seen, such a change to the governor general's powers can be achieved only through a constitutional amendment having the unanimous support of the federal parliament and all of the provinces. Recognizing that a safety valve is necessary to deal with situations of parliamentary stalemate, however, Aucoin, Jarvis and Turnbull allow for early elections if approved by a vote of two-thirds of the House of Commons. (They would similarly require prorogation to be approved by a two-thirds vote of the Commons.) Again, this involves a transfer of discretionary prerogative power from the governor general to the House of Commons and would thus also require constitutional amendment.

For Aucoin, Jarvis and Turnbull, constructive non-confidence, within legally binding fixed election dates, along with the safety valve of a two-thirds vote for early dissolution, is a better way than the New Zealand protocol to ensure that none of the recent minority government controversies re-occur. Are they right? I address that question in Chapter Four. First, however, we need a fuller understanding of the New Zealand protocol and European-style constructive non-confidence requirements in their home countries. That is the subject of Chapter Three.

## **CHAPTER 3: THE REFORMS AS THEY OPERATE ABROAD**

The New Zealand confidence protocol and constructive non-confidence are both unique reforms that modify the workings of responsible government. This chapter links the two reforms within a discussion of different types of confidence votes to capture the incremental shift from negative to positive and constructive votes of confidence. After a general discussion of confidence votes, the chapter delves into the particularities of each reform. Why the reforms developed and how they have functioned in countries that use them are important considerations for this thesis. Considering these questions fills the gap which the Canadian literature on adopting the New Zealand protocol or constructive non-confidence has left behind: proponents of these reforms have failed to pay significant attention to the historical context of the reforms in other countries. This chapter seeks to provide deeper understanding to set the stage for the next chapters, which use counterfactual analysis to uncover what might happen if the reforms were imported to Canada.

### **Types of Confidence Votes**

Confidence votes are central to responsible government in parliamentary democracies. As outlined in the previous chapters, the people's elected representatives can withdraw confidence at any time by proposing a motion of non-confidence, which, if successful, prompts the government's resignation. But resignation-triggering non-confidence votes in parliamentary democracies vary along three dimensions: absolute versus relative majorities; negative versus constructive voting; and the presence or absence of fixed dates.

The first dimension identifies what type of parliamentary majority is required for a non-confidence vote to pass (Bergman 1993a; 1993b). Under a relative-majority rule, only a simple majority of elected representatives actually present in the confidence chamber at the time of a confidence vote is required to pass it. This is generally the case in Westminster parliamentary systems, where a government can fall any time a non-confidence motion is introduced even if a

significant number of representatives are absent.<sup>10</sup> When a resignation rule incorporates an absolute parliamentary majority requirement, non-confidence motions can succeed only if the majority of *all* members of the legislature vote in favour (even if not all members are present for the vote). De Winter (1995) and Bergman et al. (2003) find that this more stringent rule, being more difficult to satisfy, fosters greater executive stability. It is used in countries such as France, Greece, Portugal, and Sweden.

The second dimension highlights the difference between the substance of the vote and its effect on the incumbent government. Bergman (1993; 1993b), De Winter (1995), and Bergman et al. (2003) distinguish between “negative” and “positive” government resignation rules but for consistency and precision, this thesis replaces positive with constructive.<sup>11</sup> The “negative” rule is originally derived from the Westminster model and simply expresses parliament’s lack of confidence in the government. If this kind of non-confidence vote meets the relevant passage criterion (either relative or absolute majority), the government falls. Although a new government may be formed in certain circumstances, this is not required, and new elections are the most common outcome. In contrast, under the “constructive” rule, a non-confidence motion must include a proposal for an alternative government to replace the incumbent one.

Bergman et al. (2003: 156) bring these two dimensions together in the fourfold table of resignation rules – relative majority, absolute majority, constructive-relative majority, and constructive-absolute majority – that is reproduced below (Table 1). In this table, moving diagonally from the negative resignation rule using only a relative majority in the top left corner to the constructive-absolute rule in the bottom right corner represents the increasing restrictiveness of non-confidence votes and protection of executive stability.

As Table 1 demonstrates, all existing regimes that have a “constructive” requirement also employ an absolute majority rule for passing the vote. In these regimes, in other words, an absolute majority of elected members must concurrently elect a new administration in order to defeat the incumbent one (Boston, 1998: 24). Since parties must agree on a replacement

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<sup>10</sup> In Westminster systems there is generally no quorum requirement for votes of non-confidence. The only quorum that is necessary for non-confidence votes is the same as for conducting any normal business. In Canada, quorum for the House of Commons to sit is 20 members (Canada, 2011: 13).

<sup>11</sup> For Bergman (1993a; 1993b) and De Winter (1995) the positive resignation rule is a broader category than constructive non-confidence votes. Their positive category includes the non-confidence votes that only require the support of the absolute majority of legislators as well as constructive votes of confidence.

government before introducing the motion, and an absolute majority is needed to pass it, constructive non-confidence votes in the lower right quadrant of Table 1 are the most difficult of the resignation rules to employ, giving the executive a greater degree of security from a loss of confidence compared to negative resignation rules. This kind of constructive resignation rule has been rarely used in the countries that adopted it to either engineer a mid-term transition or remove an unpopular head of government.<sup>12</sup>

**Table 1: Types of Non-Confidence Votes in Parliamentary Democracies**  
(Selected European countries and the Anglosphere)

	<b>Negative</b>	<b>Constructive</b>
<i>Required Majority</i> <b>Relative</b>	Australia, Austria, Belgium (until 1995), Canada, Denmark, Finland, Italy, Ireland, Luxembourg, Netherlands, New Zealand (until 1996), Norway, Sweden (until 1971), United Kingdom	No Cases
<b>Absolute</b>	France, Greece, Iceland, Portugal, Sweden (since 1971)	Belgium (since 1995), Germany, Hungary, Poland, Slovenia, Spain

Reproduced from Bergman et al. (2003: 156).

The reader will notice that New Zealand after 1996 is not present in this table. That is because New Zealand since the development of its confidence protocol occupies a middle ground along the negative-constructive dimension. New Zealand’s confidence protocol does not fall squarely in the “negative” column for, as noted in Chapter Two, it encourages constructive voting by instructing the governor general to accept the defeated government’s resignation only if an alternative government cannot be found. At the same time, New Zealand’s protocol does not fall in the “constructive” column of Table 1 because it does not require the kind of fully constructive voting assumed by that column. Given the importance of the New Zealand protocol

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<sup>12</sup> Commonly, constructive non-confidence is seen as a way to withdraw confidence and replace one government with another. Yet, it can only be used by a governing party or coalition to remove a head of government that refuses to resign. In such a case the government remains composed of the same parties but there is a change in leadership. This happened in Poland in 1995 and Hungary in 2009.

for this thesis, we will thus need to modify the table; it requires an intermediate category that captures the fact that constructive non-confidence votes are possible and even encouraged by certain institutional rules but are not required as is the case in countries that have constructive non-confidence entrenched in their constitutions.

Table 1 also neglects another feature of considerable importance for this thesis, namely, fixed election dates. True, fixed election dates are not actually part of resignation rules, but they can modify the practice of the confidence convention or resignation rule in use. For example, a formally negative resignation rule might become more constructive to the extent that a binding fixed election date eliminates the option of an early dissolution and makes a mid-term transition the implicit outcome of a non-confidence vote (Russell, 2008: 140). The more rigid the fixed-date regime is in a country, the more it will tilt non-confidence votes in a constructive direction.

Table 2 makes the necessary modifications in the Berman et al. (2003) typology. In this table, the negative-constructive dimension now includes an intermediate semi-constructive type of confidence vote to acknowledge the New Zealand protocol. That is, there are now three main columns, representing “negative” non-confidence rules, “semi-constructive” rules, and fully “constructive” requirements. Moreover, the first two of these columns are subdivided to indicate whether the countries have fixed election dates or not.<sup>13</sup> (The third, “constructive” column is not divided because fixed election dates are an integral part of the logic of fully constructive non-confidence requirements).

As with Table 1, moving diagonally from the top left to the bottom right of Table 2 captures a progression from the simpler to the more stringent resignation rules. As well, any of the confidence votes that are in the bottom row are harder for the opposition to use than those in the rows above them so that a negative-absolute resignation rule is more difficult to achieve for parliament than a negative-relative rule. Alternatively, within each column along the negative-constructive dimension, the resignation rule that is not coupled with fixed election dates is easier to use than when such legislation is present. For example, the relative-semi-constructive confidence vote that does not include fixed-date legislation (e.g., New Zealand) allows parties to withdraw confidence and then choose not to propose an alternative government whereas when

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<sup>13</sup> The presence of fixed dates in the cases included in Table 2 is drawn from Milner (2005) and his study of fixed election dates for possible reform in Canada.



**Table 2: Types of Non-Confidence Votes in Parliamentary Democracies**  
(Selected European countries and the Anglosphere)

	<b>Negative</b>		<b>Semi-Constructive</b>		<b>Constructive</b>
	<i>No Fixed Dates</i>	<i>Fixed Dates</i>	<i>No Fixed Dates</i>	<i>Fixed Dates</i>	<i>Fixed Dates</i>
<b>Relative</b>	Australia Canada (until 2007) Denmark Ireland New Zealand (until 1996) Sweden (until 1971) United Kingdom (until 2011)	Austria Belgium (until 1995) Canada (since 2007) Finland Italy Luxembourg Netherlands Norway	New Zealand (since 1996)	United Kingdom (since 2011) (Canada if the NZ protocol adopted)	No cases
<b>Absolute</b>	Iceland	France Greece Portugal Sweden (since 1971)	No cases	No cases	Belgium (since 1995) Germany Hungary Poland Slovenia Spain (Canada if Aucoin et al. version of constructive non-confidence is adopted)

the same resignation rule is paired with fixed election dates, parties are more strongly expected (although still not required as under constructive resignation rules) to organize an alternative government (e.g., United Kingdom since 2011, and Canada if it adopted a semi-constructive confidence protocol).

We should not overstate this difference between New Zealand and the United Kingdom. In New Zealand, the parliamentary term is constitutionally capped at three years, whereas in the UK (as in Canada), the constitutional maximum is five years. With New Zealand elections already being more frequent than in countries with longer maximum terms, it is less likely for parliament to be dissolved significantly before the maximum term expires. In effect, the short maximum term serves indirectly to establish something approximating fixed dates. Nevertheless,

we still need to take account of the logical difference between regimes with and without fixed election dates; this difference may affect political behaviour to a greater extent in regimes that have fairly lengthy maximum parliamentary terms.

The more complex categorization of resignation rules provided in Table 2 is a useful way to conceptualize the various intricacies that differentiate confidence votes. As well, it shows how pushing Canada towards the right side of the table and even downwards, as desired by various proponents of reform, will move Canada towards stricter confidence rules. The reforms recommend either writing down constitutional conventions in a non-legally binding document like a Cabinet Manual, or more drastically limiting the flexibility of the confidence convention by entrenching a constructive non-confidence requirement. The table clearly demonstrates that a constructive non-confidence requirement will offer far more stability than the current situation, especially if an absolute majority is required, because using it will result in an alternative government being formed rather than an early dissolution.

Interestingly, Aucoin, Jarvis and Turnbull do not explicitly address the issue of whether a relative or absolute majority is needed to pass the kind of constructive non-confidence vote they propose for Canada (2011: 222). They describe their proposed non-confidence requirement as

a simple statement that confidence has been lost, as long as the motion also clearly states which opposition party leader would be willing and able to form an alternative government with the support of a simple majority of MPs (2011: 222).

It is logically true that the “simple majority” needed to “support” the alternative government after the non-confidence vote has displaced the existing government must be an absolute majority of MPs, and according to Aucoin, Jarvis and Turnbull, the non-confidence motion must “clearly state” the existence of such a majority. But it is not clear from their formulation that the same “absolute majority” is required to pass the non-confidence motion itself. Perhaps this is implied, however, because unless an absolute majority passes the non-confidence motion, how could one be certain that the alternative government had enough support to fare better than the defeated one? For this reason, I place the proposal by Aucoin, Jarvis and Turnbull into the bottom right cell of the table. The fact they do not explicitly address this rather important question, however, counts as evidence that Canadian proponents of constructive non-confidence have yet to fully think through their proposal.

As for the New Zealand protocol, it falls shy of constructive non-confidence because the protocol only requires a relative majority for a non-confidence vote to succeed and does not require the support for an alternative government to be organized prior to the vote. Yet, because the virtual right of dissolution is removed from the prime minister if confidence is withdrawn, the New Zealand protocol can be said to encourage mid-term transitions and thus constructive votes. Hypothetically, Canada would fall on the right side – the fixed elections half – of the semi-constructive column, as, like the UK, Canada has passed fixed election legislation.

Now that we have teased out the relationship between the two reforms proposed for Canada and how the adoption of either of these reforms would move Canada from the negative category of confidence votes towards the positive end of the spectrum, we can pursue a detailed examination of the two reforms themselves. What were the origins of the New Zealand protocol and constructive non-confidence? How have they functioned in the countries that have adopted them and what have been the effects of the reforms? Understanding the two reforms and their impacts is essential to understanding how significant the impact will be for the confidence convention in Canada.

### **The New Zealand Protocol and the Cabinet Manual**

Although the New Zealand “confidence protocol” is supported by a number of Canadian academics, it is important to note that the term is a Canadian construct coined by Aucoin and Turnbull (2004). It is the name accorded to certain sections in the New Zealand Cabinet Manual that address government formation, mid-term transitions, and early elections. The protocol itself modifies the traditional Westminster negative resignation rule in New Zealand by encouraging the House to vote constructively when voting non-confidence in the government.

The Cabinet Manual is part of New Zealand’s informal constitution. As such, its constitutional nature has meant that its contents, including the confidence protocol, are often referenced in New Zealand literature focusing on the executive and executive-legislative relations (for instance see McLeay, 1995; McLeay, 1999; Palmer and Palmer, 2004; Hayward, 2006; McLeay, 2010) and there is a small body of work that discusses its development, especially in relation to New Zealand’s adoption of proportional representation (Boston et al., 1998; Kitteridge, 2006; Cartwright, 2006). The Cabinet Manual’s role has been significant

enough in New Zealand that it has attracted attention in other Westminster states such as the United Kingdom and Canada. In Canada, it is seen as a way to stabilize minority government because it clarifies the conventions for government formation, upholds the preference for mid-term transitions over early elections, and protects the neutrality of the crown (Aucoin and Turnbull, 2004; Russell, 2009b; Russell and Milne, 2011; Harland, 2011; Hicks, 2012; Public Policy Forum, 2012). Despite the number of commentators who support the reform, only Aucoin, Jarvis and Turnbull (2011) offer some discussion on how the protocol has stabilized New Zealand. Accordingly, there is room for further research on the New Zealand case that moves beyond the assumption that the adopting the reform will successfully increase stability in Canada.

#### *Development of the Cabinet Manual*

The Cabinet Manual reflects the development of responsible government and cabinet conventions and procedures in New Zealand. Since the cabinet secretary was first admitted into cabinet meetings, the Cabinet Office has kept a record of cabinet procedures. These records evolved into the first edition of the Cabinet Manual in 1979 (Cabinet Office, 1979: 1). However, the document was not publicly available but rather restricted within the executive. The earliest version of the Manual was simply loose-leaf folders that could be updated at need, so it was not formally re-issued until 1991. That edition was the first one to become unrestricted and open to all public servants (Kitteridge, 2006: 10).

The Cabinet Manual is considered part of New Zealand's informal constitution, on par with inherited legislation from the United Kingdom and constitutionally significant legislation passed by the New Zealand House of Representatives, such as the Electoral Act 1993 and the Constitution Act 1986 (Palmer and Palmer, 2004: 5). Unlike such statutes, the Cabinet Manual is not a legal document; it takes its authority instead from constitutional convention (Kitteridge, 2006). This conventional authority is confirmed and underlined by well-established political practice. For example, it is now tradition in New Zealand for new governments to endorse the document in their first cabinet meeting to ensure the orderly re-commencement of government business (Cabinet Office, 2008: xvii). In addition, when governors general discuss their role in

public they will refer to both what their predecessors have said and what is written in the Cabinet Manual (Tizard, 1993).

The Manual guides cabinet's activity by setting out the roles and procedures for the governor general, executive council, ministers, and departments and describes the relationships both within and between different branches of government. Most importantly, it defines essential constitutional conventions that underpin responsible government in New Zealand (Palmer and Palmer, 2004: 44).

Over time, the Manual has been adapted to respond to new controversies and developments. Consider the caretaker convention: it was incorporated into the Cabinet Manual because there had been a grievous example of an outgoing government refusing to act on an important policy issue, even when pressed by the incoming government.<sup>14</sup> The adoption of the mixed member proportional (MMP) electoral system in 1993 has had perhaps the greatest effect on the Manual's development because it had to be updated for the 1996 election to cover the increased uncertainties of a proportional representation system and the likelihood of hung parliaments and minority governments (Cabinet Office, 1996: xi; xiii). In response to these issues, there was a recognized need to articulate conventions relevant to government formation and transition. As well, the 1996 Manual was the first published edition, made available through a national bookstore chain and then online in 1998. It was hoped that greater accessibility to the Manual would reassure the public that government formation would occur efficiently and without unnecessary intervention by the governor general. (Kitteridge, 2006: 9-10)

The 1996 changes proved to be insufficient as the "actual experience of coalition and minority government – particularly from 1996 to 1999 – demonstrated the desirability of setting out authoritative guidance on constitutional principles and procedures in advance of political events rather than formulating advice on the spot" (Kitteridge, 2006: 9). The 2001 edition was a major re-write and reflected much of the clarification of conventions that was being articulated

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<sup>14</sup> In 1984, New Zealand went through a financial crisis. Officials had briefed the outgoing Muldoon government that devaluation was necessary but Prime Minister Robert Muldoon refused to act. The incoming Labour government wanted to follow through with the suggestion and had indicated so to Muldoon. But it took Muldoon three days before he conceded and "wrote to the Prime Minister-elect saying he would act on the decisions of the incoming government in relation to the currency crisis" (Palmer and Palmer, 2004: 45-46). In the 1996 Cabinet Manual the convention of caretaker government was spelled out clearly in sections 2.35-2.51. Since the 1984 incident the caretaker convention has been extensively fleshed out by officials and agreed to by ministers prior to the 1996, 1999, and 2002 elections. (Palmer and Palmer, 2004: 46).

by the then Governor General, Sir Michael Hardie Boys (Kitteridge, 2006: 9). Hardie Boys made two key speeches that defined his role in government formation and mid-term transition. The first speech in 1997 covered the government formation process prior to the 1996 election and reaffirmed the principle of responsible government. The speech makes clear that although the governor general is responsible for ascertaining where the support of the House lies, when the situation is unclear, political parties must reach an adequate accommodation and then communicate their decisions through a public medium so that the governor general does not have to get personally involved.

In a parliamentary democracy such as ours, the exercise of the powers of my office must always be governed by the question of where the support of the House lies. If that is unclear, I am dependent on the political parties represented in the House to clarify that support, through political discussion and accommodation (Hardie Boys, 1997).

That is, the governor general must rely on clear public statements made by the politicians and through the cabinet secretary. Only when the politicians have reached their decisions and made a clear public announcement about who holds confidence (regardless if it is the largest party or not), will the governor general appoint the designated leader to the prime minister's office (Hardie Boys, 1997).

The second speech followed the mid-term transition from the National-New Zealand First coalition majority government to the minority National government in 1998. Governor General Hardie Boys underlined the legitimacy of mid-term transitions and set out what steps the political parties should take during government formation or transition so that it is clear they are the ones making the political decisions and the neutrality of the governor general remains intact. Moreover, Hardie Boys added that during times of political uncertainty, the Opposition should publicly state whether they are interested in trying to form a government (1998). Thus, Hardie Boys acknowledged that an alternative government should be given a chance before heading to dissolution, something that would be elaborated on in subsequent editions of the Cabinet Manual.

Based on Hardie Boys' speeches, the 2001 Cabinet Manual incorporated a whole new chapter, one that would draw the attention of Aucoin and Turnbull (2004) in Canada. This new chapter – chapter four in the 2001 edition and now an updated chapter six in the 2008 edition –

covered established practices on elections, transitions, and government formation. This chapter established principles to guide the governor general during periods of government formation or political crisis – essentially the principles that had been publicly explained by Governor General Hardie Boys, including that he or she need not accept a defeated prime minister’s advice to dissolve parliament and call new elections.

### *The New Zealand Confidence Protocol*

The introduction to the New Zealand Cabinet Manual states that the underlying principles of the regime are responsible government and democracy. Therefore, “the Queen reigns... but the government rules... so long as it has the support of the House of Representatives” (Cabinet Office, 2008: 3). Since 1979, the Manual has recommended the governor general can use his or her own discretion in a limited number of cases but the governor general should abide by the constitutional conventions. This is especially true regarding political neutrality: section 1.11 specifies that the governor general must refrain from becoming involved in the “politics” of government (Cabinet Office, 2008: 8).

The importance of the governor general’s neutrality and the confidence mechanism are clearly articulated in the Cabinet Manual’s chapter on government formation and transitions. Under the mid-term transitions portion of the chapter, the Manual recognizes the necessity of such transitions if a new prime minister, or a new governing coalition, is required. The prime minister may change due to retirement, incapacity, or death, or because confidence has been lost. These are obviously two kinds of mid-term transitions. The first involves a change of prime minister within the existing government; the second involves a change from one government to another. It is the latter kind of mid-term transition – a transition to an alternative government – that the confidence protocol is particularly concerned with legitimizing and encouraging. Dissolution remains possible if confidence is lost and an alternative government does not emerge, but dissolution is definitely not the default assumption. The key rules governing governmental transition and dissolution are found in section 6.54-6.58<sup>15</sup> of the Manual.

Section 6.55 addresses situations where the “confidence of the house” becomes unclear, as “in the case of a change in coalition arrangements,” and requires the incumbent government to

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<sup>15</sup> The full text of these sections can be found in Appendix A.

“clarify” where confidence lies within a “short” and “reasonable” time (Cabinet Office, 2008: 83). That clarification might mean that the government retains confidence, in which case it remains in power. Or the clarification might be that the government has lost confidence. In other instances, of course – i.e., with a direct and unambiguous confidence vote – there may be no lack of clarity about where confidence lies. Importantly, during a period when confidence is unclear the prime minister is bound by the caretaker convention and so should not advise the governor to use the prerogative powers without consulting the opposition parties (Cabinet Office, 2008: 9; 78-79; 83-84).

Section 6.54 indicates that once a government has clearly lost confidence, the prime minister should submit his or her resignation to the governor general. Subsection 6.54.a then immediately makes it clear that the governor general may accept the resignation and appoint an alternative “administration that has the confidence of the House” if one “is available” (Cabinet Office, 2008: 83). This occurs if the opposition clearly indicates to the governor general (generally through public venues) that an alternative is possible. If no willing and viable alternative “is available,” subsection 6.54.b allows the governor general to call new elections, though section 6.58 discourages this by “expect[ing]” the defeated prime minister, acting under the caretaker convention, “to consult other parties on a decision to advise the calling of an early election, as the decision is a significant one” (Cabinet Office, 2008: 83). In other words, even if the confidence vote that defeats a government is not immediately and directly constructive – i.e., even if it is a “negative” confidence vote – section 6.58 promotes a “consultation” that might give it a “constructive” outcome rather than triggering new elections. Only if none of this works and an alternative government does not come to light, will the governor general dissolve parliament (Cabinet Office, 2008: 83).

It is important, moreover, that the opposition be clear about preferring new elections to forming an alternative government. This was underlined in 1998 when Prime Minister Jenny Shipley called a confidence vote to test the viability of a change in the structure of her government. For reasons to be explored below, the majority coalition government led by the Prime Minister fell apart and was replaced by a minority government consisting of only her own party. The confidence vote called by Shipley confirmed confidence in the new arrangement, but Opposition Leader Helen Clark stated publicly that if the “minority Government proved



unsustainable, she would not wish to try to form a Government, but would prefer an election” (Hardie Boys, 1998). The Governor General commended this statement to the media for clearly indicating what course of action he should take, and said that he would have appointed Clark to the office of prime minister if Shipley had been defeated and Labour had desired to form an alternative government. Moreover, this event influenced the drafting of what became Chapter Six of the Cabinet Manual.<sup>16</sup> In circumstances when the politicians themselves have made it clear that an election is needed, the defeated prime minister’s resignation, tendered under section 6.54, is not accepted and the incumbent government continues under the “caretaker convention.”

The sections of the Manual discussed thus far apply only to situations where confidence is lost or becomes unclear. They do not, therefore, foreclose the possibility that a government that technically continues to enjoy confidence – i.e., that has not lost a confidence vote – could call an election at its discretion, a possibility that must exist given that New Zealand has no fixed election date legislation. Thus section 6.57 of the Manual clearly recognizes that “In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an election,” and that “in accordance with convention, the Governor-General will act on [this] advice” (Cabinet Office, 2008: 83). Section 6.57 goes on to make clear, however, that the governor general will accept the advice to dissolve parliament only “as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government” (Cabinet Office, 2008: 83). Here, it is made clear that the governor general only has to take the advice of a prime minister who holds the confidence of the House of Representatives (Kitteridge, 2006: 9).

Accordingly, although section 6.57 effectively prevents a prime minister from dissolving parliament in order to forestall a non-confidence vote, it does not prevent a prime minister who clearly continues to enjoy confidence from calling an early election. True, the Manual suggests that the advice for dissolution should normally be timed in accordance with the traditional three-year electoral cycle (based on the three-year maximum life of parliament), but section 6.57 expressly allows for earlier election calls (Cabinet Office, 2008: 84). An example is the 2002 election, which was called a few months early on the advice of Prime Minister Helen Clark,

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<sup>16</sup> The transition from coalition majority to single-party minority government in 1998 provided the basis for the section mentioned above, 6.58 of the current edition of the Cabinet Manual.

whose Labour Party wanted to take advantage of its strong support, which exceeded 50 percent, to get a renewed mandate at a time when the government's junior coalition partner was disintegrating (Inter-Parliamentary Union, 2002: "New Zealand").

In sum, the provisions in the Manual indicate that mid-term transitions are strongly preferred to early dissolution in a case where the position of the government is unclear or where confidence is lost. In either of these cases, an available and willing governing alternative will get the opportunity to govern. However, if a prime minister retains confidence, little stands in the way of him or her requesting early dissolution. As long as confidence clearly persists, the governor general's powers of summoning, prorogation, and dissolution continue to be exercised, by convention, on the advice of the prime minister (Cabinet Office, 2008: 75). When confidence persists, therefore, it is up to the prime minister to determine if an early-election decision might incur the electorate's wrath. Helen Clark obviously thought the risk was worth taking in 2002. In fact, however – as the next section demonstrates – Clark's "early" election has been an exception; most New Zealand elections since 1996 have closely tracked the three-year constitutional maximum.

### *Experiences with the New Zealand Protocol*

Although the New Zealand confidence protocol explicitly prefers mid-term governmental transitions to elections when a government loses a confidence vote, there have in fact been no such transitions to replace a defeated government since 1996. Instead, parties, guided by the Cabinet Manual's rules, have negotiated amongst themselves and generated stable legislative agreements that have proved successful at navigating New Zealand's hung parliaments (Palmer and Palmer, 2004: 39).

As an example of how parties have managed the difficulties of coalition and minority governments under proportional representation, consider the falling out between the National and New Zealand First parties in the summer of 1998 that led to Prime Minister Shipley's above-mentioned call of a vote testing the confidence in her restructured government. The two parties were part of a majority coalition government, but relations between them broke down over a number of issues including the sale of the Wellington Airport and cabinet procedure (McLeay, 2010: 191). So, on August 14, the Prime Minister advised the Governor General to dismiss the

leader of New Zealand First, Winston Peters, from his ministerial responsibilities. Then the coalition partners agreed that their coalition would terminate on August 26, which led to the resignation of some of the other New Zealand First ministers and new National ministers being appointed on August 30. The result was a National Party minority government. As noted above, when the Prime Minister moved a confidence motion to test whether this new minority government had the House's confidence, confidence was confirmed and the political crisis resolved itself. This was indeed a tidy mid-term transition (Hardie Boys, 1998), but not one that followed a non-confidence vote that defeated the incumbent government. Because the latter situation has not yet occurred we are left only with the conventions as described in the Cabinet Manual to predict what would happen in the event of a clear loss of confidence. Would the opposition generally prefer – and thus get – an early election, as would likely have happened if Prime Minister Shipley's government had been defeated in 1998 (given Opposition Leader Clark's stated preference for an election), or would the Manual succeed in encouraging mid-term transitions? We cannot know the answer to this question.

What we do know is that New Zealand governments after 1996 have – with the exception of the 2002 election – generally lasted their full term and that the crown has not been drawn into any sticky political situations when coalitions have disintegrated. The IPU Parline database suggests that elections since 1996 have occurred close to the normal expiry of the House of Representatives. It may be that New Zealand's confidence protocol, with its clear preference for parliamentary stability, has contributed to this experience.

Table 3 summarizes the governing outcomes of elections from 1996 to 2011.

**Table 3: New Zealand Elections and Governments**

<b>Election Date</b>	<b>Government</b>	<b>Type</b>	<b>Legislative Majority?</b>	<b>Coalition Agreements</b>	<b>Legislative Agreements</b>
1996 (12 October)	National-New Zealand First (Prime Minister Jim Bolger)	Coalition Majority	Yes	National and New Zealand First	
	National-New Zealand First (Prime Minister Jenny Shipley)	Coalition Majority	Yes	National and New Zealand First	
	National (Prime Minister Jenny Shipley)	Minority	No		
1999 (27 November)	Labour-Alliance (Prime Minister Helen Clark)	Coalition Minority (by one seat)	Yes	Labour and Alliance	Greens
2002 (27 July)	Labour-Progressives (Prime Minister Helen Clark)	Coalition Minority	Yes	Labour and Progressives	United Future, Greens
2005 (17 September)	Labour-Progressives (Prime Minister Helen Clark)	Coalition Minority	Yes	Labour and Progressives	United Future, New Zealand First, Greens
2008 (8 November)	National (Prime Minister John Key)	Minority	Yes		ACT New Zealand, United Future, Maori Party
2011 (26 November)	National (Prime Minister John Key)	Minority (by two seats)	Yes		ACT New Zealand, United Future, Maori Party

The table illustrates how most of the MMP elections have tended to fall in the southern hemisphere's spring months (the exception being July 27, 2002), particularly in November. This conforms to the pattern prior to the introduction of MMP (1890-1993), when elections overwhelmingly fell every third November. Clearly, New Zealand governments since 1996 have been relatively stable. While most of them have been minority governments – either single party or coalitions – parliamentary and executive stability has remained strong through a clever combination of legislative agreements, which guarantee support on confidence matters in exchange for certain concessions, and the innovation of assigning portfolios to ministers outside of cabinet. It is worth noting that ministers outside cabinet are not simply junior ministers; they can hold senior portfolios like Foreign Affairs and participate in meetings of cabinet sub-committees. However, despite all members of a ministry holding constitutionally defined positions on the executive council, not all ministers sit in the full meeting of cabinet (McLeay, 2010: 189; 200).

This strategy was pioneered by Helen Clark after the 1999 election and involved broadening who is involved in policy development and implementation. Labour signed a coalition agreement with the Alliance, but because both parties together were still two seats shy of a majority, Labour then signed a looser agreement with the Greens that guaranteed their support for matters of supply and confidence, termed a confidence and supply agreement. The agreement with the Alliance party eventually disintegrated publicly, leading to the party's collapse. With both the experiences of the National-New Zealand First coalition (1996-1998) and the Labour-Alliance coalition (1999-2002) ending in failure, after the 2002 election the Labour party devised a new strategy that has been the staple governing arrangement since: single-party government with confidence and supply agreements signed with more parties than necessary to allow the government extra legislative flexibility (Palmer and Palmer, 2004: 43). This way, if the government cannot rely on one of its confidence and supply partners, it can still turn to another signatory party to pass legislation. But the new governing arrangements did not end there; ministers were also appointed from parties that signed the confidence and supply agreements. However, because these agreements are not coalition agreements, the ministers could not sit in cabinet but instead held portfolios outside of cabinet, which allowed for those parties that agreed to support the government to break rank with the government when needed. This gave the

government's partners the opportunity to retain their distinctive identities and maintain their voter support, which often suffers when smaller parties join coalitions. Criticism was limited in one important way: cabinet solidarity bound a party from criticising the government on issues relevant to the portfolio that is held by one of their own (McLeay, 2010: 193). The arrangements established in 2002 worked well and Labour was able to survive the full parliamentary term in its small coalition with two Progressives with guaranteed support on confidence matters from United Future and a cooperation agreement with the Greens.

In 2005 Prime Minister Clark repeated her formula again, signing a coalition agreement with its one-person partner, Jim Anderton's Progressives, and confidence and support agreements with New Zealand First and United Future. There was also a cooperation agreement with the Green Party to advance certain environmental policies, though the Greens were not given a ministry (McLeay, 2010: 187). In exchange, those parties agreed to abide by collective responsibility on issues in which they were involved (McLeay, 2010: 193). Clark's innovative strategies have subsequently been adopted by John Key and the National Party to sustain his minority government through its first and now second term. As an example, for the 49<sup>th</sup> Parliament (2008-2011), National negotiated agreements on matters of supply and confidence with ACT New Zealand, United Future, and the Maori Party and agreed to appoint ministers outside of cabinet from all three parties, for a total of five extra-cabinet ministers (McLeay, 2010: 187).

### *The Effect of the New Zealand Protocol*

The parliamentary stability evident from the generally infrequent dissolution of the House of Representatives clearly owes much to the success of the supply and confidence agreements. What is unclear is how much the New Zealand confidence protocol as stated in the Cabinet Manual actually drove parties to create the legislative agreements. It is arguable, however, that the protocol has had an effect, especially through its insistence that early dissolutions are the last resort solution to parliamentary or executive instability, which induces parties to find common ground and ways to work together for the duration of the term.

It is implicit in all of the coalition and supply and confidence agreements that the government retains power only so long as it holds confidence. The supply and confidence

agreements are central to ensuring parliamentary (and executive) stability by guaranteeing that so long as certain concessions are made to the signatory parties, the government can continue in power. Moreover, signing such agreements indicates to the governor general where confidence lies and when the agreements are broken, the governor general is alerted to a potential crisis. Still, as the New Zealand protocol maintains, it is not up to the governor general but to the parties to solve the crisis and determine who has confidence. Only if no party can sustain confidence is dissolution an option available to the governor general. But, it is clearly the last resort envisioned by the protocol, and it is just as clearly a last resort that supply and confidence agreements seek to prevent.

The parliamentary stability that is promoted by the New Zealand protocol has garnered attention from other countries. As has been noted, Canadian academics have drawn inspiration from the New Zealand method. So too have British academics, civil servants, and politicians: the United Kingdom has recently adopted its own Cabinet Manual, which also incorporates a chapter on elections, government formation, transitions, and early dissolution.<sup>17</sup> The British made this move when it became clear that there was a real possibility that the 2010 election would result in a hung parliament; they did not want to replicate Canada's "dysfunctional" House of Commons but rather sought intelligence from New Zealand's experiences (Russell, 2009b: 214). Consequently, the former Prime Minister Gordon Brown commissioned Cabinet Secretary Sir Gus O'Donnell in 2009 to head up efforts to "consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document" ("Cabinet Manual," 2011). Three parliamentary committees all worked together to develop a draft Cabinet Manual in time for the May 2010 election to reassure the public and help stabilize government formation in expectation of a hung parliament. The final draft document was published in October 2011 (Blick, 2012: 2).

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<sup>17</sup> The United Kingdom's Cabinet Manual is similar to the New Zealand protocol. The British document recognizes the legitimacy of coalition government and mid-term transitions, stating that when a non-confidence vote has been passed, there is a 14-day period in which the incumbent government can retain confidence or a new administration can be formed, and if neither option is met, then parliament can be dissolved. As well, the Cabinet Manual expects a prime minister to resign if he or she has lost the House of Commons's confidence. Lastly, an interesting development in the British Manual is reflects the country's own political reforms: a safety valve that allows early dissolution if two-thirds of the House of Commons agree on an immediate general election. (Cabinet Manual, 2011: 15-16)

Unlike hard constitutional requirements, a Cabinet Manual provides a flexible method for cataloguing constitutional conventions, a dictionary of cabinet and constitutional procedure that can change to reflect evolving practice. As such, the New Zealand protocol has a distinctive advantage in a system of responsible government for it reflects the malleable nature of the system and does not actually create hard and fast rules that would bind its operation in the manner of constitutional amendments (Kitteridge, 2006: 6). Because flexibility is maintained a cabinet-manual approach protocol fits within the constitutions of New Zealand and the United Kingdom, with their strong reliance on conventions. The approach emphasizes a semi-constructive resignation rule that is far less rigid than a fully constructive non-confidence requirement but that might encourage a similar amount of parliamentary and executive stability, especially when tied to fixed election dates (as is the case in Britain, and would be if adopted in Canada).

While this approach has been attractive to some Canadian observers, European-style constructive non-confidence requirements have also become part of the parliamentary reform debate in this country. Unfortunately, Aucoin, Jarvis and Turnbull (2011), the main proponents of the reform, do not give extensive treatment to the proposal. Certainly, they do not significantly investigate its origins and practice in the European regimes that have adopted it. Indeed, the only Canadian article to touch on the history of constructive non-confidence abroad, albeit briefly, is Hicks (2012). We need a fuller comparative investigation of the constructive non-confidence model.

### **Constructive Non-Confidence**

Constructive non-confidence as a subject in and of itself is rare even in the literature about European regimes, perhaps because it is so infrequently used. Nevertheless, it tends to be briefly discussed in literature on government formation, resignation, and stability (for example, Bergman, 1993; De Winter, 1995; Boston, 1998; Bergman et al, 2003). There are, of course, exceptions such as Diermeier, Eraslan and Merlo's (2002) study, which conducts a counterfactual statistical exercise to determine if constructive non-confidence does stabilize German governments. Not surprisingly, they find that German governments last longer with constructive non-confidence in place than they would otherwise (Diermeier et al., 2002: 905).



Constructive non-confidence also generally features in the literature on the development of the German Federal Republic and its constitution (Golay, 1958; Niclauss, 1998; Bernhard, 2005) because it is one of the major innovations to constitutional design provided by the Germans. Lastly, it sometimes features in discussions about “chancellor democracy” or *Kanzlerdemokratie*, which describes a parliamentary democracy dominated by the head of government (Niclauss, 2004; Sutherland, 1998).

This section brings together available research on the constructive confidence vote: it covers the German rationale for its introduction, the reasons for its adoption elsewhere, and the experiences in the six European countries that have implemented it. As well, we will consider whether constructive non-confidence has successfully stabilized the executive and prevented early elections.

### *Weimar and the Creation of Constructive Non-Confidence*

In the wake of the First World War, the Germans drafted a liberal democratic constitution for the so-called Weimar Republic, which embraced proportional representation but failed to establish a minimum vote threshold that parties had to meet or exceed in order to win seats, meaning that a party with as little as one percent of the popular vote could get representation in the German Reichstag or parliament. As a result, the Reichstag was highly fragmented and unstable, subject to frequent elections.

One important source of instability was extremist parties that worked within the system to undermine it regardless of whether or not they had any common ground. For example, ideologically opposed parties, such as the Nazis and the Communists, often came together to form negative majorities against the incumbent chancellor even though they could not constitute a majority that would support a successor government (Roberts, 2009: 129). This is what happened in the Prussian Landtag in 1932, when the Nazis and Communists united to vote non-confidence in the first minister (Golay, 1958: 128). Further complicating matters were the powers of the Weimar Republic’s president. As the president was directly elected by the German people and the chancellor was both responsible to the president and the parliament, the chancellor was placed in weak position relative to the president. This situation was exploited by President Hindenburg, who consistently vetoed his chancellor’s actions (Conradt, 2005: 188; von

Beyme, 1986: 111). The President also used the presidential emergency powers to appoint chancellors and by-pass the Reichstag, which resulted in new chancellors who often lacked parliamentary support (Erlar, 1965: 9)

Therefore, when the German Parliamentary Council set about drafting a new constitution in the late 1940s, it sought to guard against a repeated series of parliamentary dissolutions and snap elections that had characterized the Weimar Republic (Morgan, 1972: 355). It was especially concerned with the threat and instability posed by extremist anti-system parties (Southern, 1994: 27-28). Finally, it wanted to tame excessive presidential powers (Merkl, 1963: 22-23). The idea was to protect the prime minister's office and the parliamentary executive against an interfering president and to secure greater parliamentary stability especially against the threat of a radical (but non-cohesive) parliamentary majority. Constructive non-confidence, which was originally created in Baden-Wurttemberg under the tutelage of American military advisors, was part of the solution to all of these problems (Merkl, 1963: 81-82).

To address the problem of anti-system parties, the Parliamentary Council embraced the philosophy of militant (or combative) democracy (*streitbare Demokratie*), a term coined in 1935 by Karl Löwenstein, which holds that democracy must have the capacity to defend itself against alternative regimes. Löwenstein argued that the lack of militancy in the Weimar constitution allowed radical elements to exploit the regime for their own advantage (Thiel, 2009: 110). The philosophy proposes that the democratic system should guarantee various democratic rights while also actively countering anti-democratic ideas and movements (Roberts, 2009: 204; Thiel, 2009: 115). Constructive non-confidence contributed to militant democracy by ensuring that parties in the Bundestag cannot work within the regime to destabilize government by constantly withdrawing confidence as was done during the Weimar Republic. It similarly prevented opposition parties loyal to the regime from causing early elections. Under the new Basic Law, parties proposing to unseat a government first had to negotiate a coalition to replace that government. This rule applied for the duration of the constitutionally fixed parliamentary term, which is set out in Article 39 of the Basic Law.<sup>18</sup>

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<sup>18</sup> Under Article 39, the Bundestag is required to sit for four year terms:

“(1) Save the following provisions, the Bundestag shall be elected for four years. Its term shall end when a new Bundestag convenes. New elections shall be held

In other words, the negative resignation rule in use in the Weimar Republic, which was so easily exploited to foster parliamentary and executive instability, was replaced by a positive or “constructive” rule designed to stop the constant destruction of government by opposition parties. In particular, it would protect the free and democratic basic order and its legal system against anti-republican forces (Döhring, 1988: 37). No longer would it be possible for parties that could not work together – like the Nazis and Communists – to block the operation of government. Carlo Schmid, the lead delegate for the Social Democrats (SPD) to the Parliamentary Council, was very clear about this:

Should any spurious majority whose two wings hate each other like poison be able to block the operation of government? If the answer is yes, then we must stand by the old arrangement by which any kind of majority was sufficient to overthrow the government. If, however, we are of the opinion that a genuine opposition is not possible without the corresponding conception of responsibility, then we must adopt the point of view that a vote of no-confidence, with all its consequences, may be proposed only by a majority willing and able to undertake the task of government. (Golay, 1958: 128)

The final version of constructive non-confidence is found in the Basic Law’s Article 67:

- (1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.
- (2) Forty-eight hours shall elapse between the motion and the election. (Germany, 2010a: 54)

This constructive non-confidence provision is part of a broader package of constitutional rules designed to address the Weimar Republic’s problems of parliamentary and executive

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no sooner than forty-six months and no later than forty-eight months after the electoral term begins. If the Bundestag is dissolved, new elections shall be held within sixty days.

(2) The Bundestag shall convene no later than the thirtieth day after the elections.

(3) The Bundestag shall determine when its sessions shall be adjourned and resumed. The President of the Bundestag may convene it at an earlier date. He shall be obliged to do so if one third of the Members, the Federal President or the Federal Chancellor so demand.” (Germany, 2010a: 38)

instability, party system fragmentation and extremism, and unchecked presidential power. Thus, while it was important to prevent parties that could not work together from defeating governments, the Parliamentary Council also worried that plausible governing coalitions might be too difficult to construct at the outset (i.e., after elections) and to maintain thereafter. This issue concerned especially the FDP (Free Democrat) representatives to the Parliamentary Council, who agreed that changing the confidence mechanism to protect against extreme parties coming together to vote non-confidence would be helpful, but that something more needed to be done to ensure parties loyal to the regime would work together (Golay, 1958: 124).

To that end, the Parliamentary Council agreed on a positive government *formation* rule to accompany the positive (constructive) non-confidence or *resignation* rule. The positive formation rule requires a vote of investiture supported by a parliamentary majority. Under this system, the president, following elections, nominates a candidate for chancellor to be voted on by the Bundestag. If the candidate is rejected by a majority, then the Bundestag has 14 days to elect a candidate of its own choosing. If the Bundestag cannot find the necessary majority, the president either appoints the candidate with the largest number of votes to a minority chancellorship or dissolves the Bundestag. The idea was to exert pressure on parties to come to speedy agreement, while also providing an electoral safety valve (via dissolution) if there is a true impasse (Golay, 1958: 126). The investiture procedure for government formation forces parties to work together from the beginning of the parliamentary term. Constructive non-confidence complements this by ensuring they continue to do so when voting non-confidence and precipitating a mid-term transition.

Both the investiture rule and its constructive non-confidence complement also contribute to the Parliamentary Council's desire to address the Weimar Republic's dual executive system, which had allowed the president to undermine responsible government and the chancellor (Conradt, 2005: 188). Under the investiture and constructive non-confidence rules, the president's role is clearly an auxiliary one. He or she must ultimately appoint a chancellor approved by the Bundestag and cannot dismiss the chancellor unless the Bundestag has elected a successor.

In weakening the power of the President, the delegates to the Parliamentary Council understood that their new Basic Law provided for a more powerful chancellor (the German

“prime minister”) who would be responsible for the government’s policy agenda (Golay, 1958: 128). Constructive non-confidence helped achieve this by making it difficult for the opposition to replace the chancellor. It also helps protect the chancellor from parliamentary revolts from within his or her own party (von Beyme, 2000: 33).

Yet, by itself constructive non-confidence would create an unfortunate asymmetry if it only allowed for an opposition-triggered confidence vote against the chancellor or government and did not give the chancellor the symmetrical ability to test for confidence (as we saw Prime Minister Shipley do in New Zealand). Permitting the government to introduce its own confidence vote is important in minority government circumstances because if the majority opposition does not introduce a constructive confidence motion yet constantly votes down all government bills, how can the government get things done? There must be a way for the chancellor to test confidence and break the deadlock. So, the Basic Law balances the constructive non-confidence provision with Article 68, which allows the chancellor to introduce a confidence vote and then specifies the following if the vote fails:

- (1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another federal chancellor by the vote of a majority of its Members.
  - (2) Forty-eight hours shall elapse between the motion and the vote.
- (Germany, 2010a: 55)

We saw above that the investiture procedure at the beginning of a parliament allows for the safety valve of dissolution and new elections if a governing coalition cannot be found. Article 68 provides a similar mid-term safety valve. By allowing the chancellor to request a vote of confidence if an obstructive opposition is unwilling itself to vote non-confidence and take the reins of power as provided for in Article 67, Article 68 clearly provides for a way out of legislative gridlock by conceding early dissolution if the chancellor fails to win the vote. It is thus a safety valve for parliament if there is no other mid-term solution available for the productive continuation of the legislative process for the duration of the fixed parliamentary term.

Golay notes that when the chancellor does ask for a vote of confidence under Article 68, the Bundestag can avoid dissolution either by supporting the chancellor or by “elect[ing] another

federal chancellor by the vote of a majority of its Members,” thereby effectively turning the vote into a constructive non-confidence vote. Golay also notes that if an Article 68 vote of confidence is negative, the president retains a discretionary right to refuse dissolution – the wording is “*may* dissolve” (emphasis added) – but argues that this discretion is limited. “Should the president refuse dissolution,” Golay writes, “he could hardly avoid acceding to a government’s request for a declaration of legislative emergency” (Golay, 1958: 131).

The safety valve of early dissolution under Article 68 is clearly intended to be an exception to the general rule. Just as the opposition cannot trigger new elections by defeating the government on a non-confidence vote, neither can the government – formally, it can only introduce its own confidence vote. The bias is clearly against the virtual right to dissolution that prime ministers in Westminster-style parliamentary democracies typically have. But what if a government that desires early elections manufactures its own defeat (by having some of its own members vote against it)? Foreseeing this possibility, Golay finds that the decision to dissolve the Bundestag early is essentially a “right belonging to the chancellor” (1958: 131). As we shall see below, Golay’s prediction has come true. First, however, let us look at the other European regimes that have followed Germany in adopting constructive non-confidence.

### *Constructive Non-Confidence in other European Regimes*

The German constructive non-confidence system was introduced in response to specific historical events, or critical junctures, that have shaped the path of German democracy. Other countries, including Spain, Hungary, Slovenia, Poland and Belgium, have subsequently adopted it based on their own historical trajectories. Spain incorporated it into its 1978 post-Franco constitution for reasons similar to Germany’s. Like Germany, Spain had faced challenges with instability and political extremism. While Germany struggled through the Weimar Republic and dissolved into the Nazi regime, Spain experienced dictatorship, the ill-fated Second Spanish Republic, and the Spanish Civil War. Like Weimar, the Second Spanish Republic was torn apart by internal divisions: the left struggled against the right and squeezed out all of the moderate parties, making it virtually impossible to form a stable government. In fact, the brevity of governments was such that the average cabinet duration was only 101 days, making the Second Republic even more unstable than the Weimar Republic (Gunther et al., 2005: 30). In the end,

democratic politics collapsed into civil war and then the fascist Franco dictatorship. When the dictatorship fell, Spain developed a constitution inspired by the Basic Law of Germany that captured the people's desire for a strong and stable democratic government (Heywood, 1995: 89-90). Constructive non-confidence was part of this constitution.

Other European countries have followed suit and joined the constructive non-confidence club to aid regime, parliamentary, and executive stability. Hungary (1989), Slovenia (1991), Poland (1992), and Belgium (1995) have all adopted constructive non-confidence.

Constructive non-confidence is very effective at removing the non-confidence vote as a cause of governmental instability because of the demand that the opposition form a new government. If instability persists, it is more likely that governments will fall due to internal problems than to confidence votes. Constructive non-confidence does not guarantee governmental stability of course. In Belgium, for example, the government certainly remains unstable, but this is now due primarily to the difficulties surrounding government formation and coalition agreements rather than to confidence votes (De Winter, 1998: 116). Indeed, since Belgium adopted constructive non-confidence in 1995, no government has been defeated on a vote of confidence. While governmental instability may in some cases persist, it is no longer exacerbated by non-confidence votes when those votes are required to be "constructive." De Winter (1995) has found, "governments in countries with negative resignation rules are more than twice as likely to be defeated as governments in countries with positive resignation rules" (1995: 140).

If and when governments have difficulty sustaining support in regimes with constructive non-confidence requirements, they will often find ways of restructuring themselves without resorting to the non-confidence device – or use it to replace a prime minister without mid-term transition of government as has happened in Poland and Hungary. Alternatively, safety-valve provisions may come into play to secure the kind of "early election" that constructive non-confidence is designed to minimize. In Germany's case, as noted above, the safety valve allows the chancellor to call a confidence vote and advise early elections if his or her government loses that vote. All of the other "constructive non-confidence" regimes also include a similar safety valve to Article 68 of the German Basic Law. For example, in Slovenia, if the president of the government (prime minister) introduces a vote of confidence and the National Assembly votes

against the government, then the deputies must either elect a new government or reinstate their confidence in the government within 30 days. If the National Assembly fails to do so, then according to Article 117, then the legislature is dissolved and new elections announced. As in Germany, the Slovenian provision opens the door to the government engineering its own defeat in order to secure new elections.

In some cases, additional safety valves are also provided for. In Belgium, new elections must be called within forty days after both houses of parliament have approved a constitutional amendment by a two-thirds majority (Deschouwer, 2009: 178). In Poland, the additional safety valve is not tied to a constitutional amendment and the Sejm can be dissolved at any point if two-thirds of its members vote for dissolution (Poland, 2010). This Polish provision functions in the same way as the safety valve proposed by Aucoin, Jarvis and Turnbull (2011: 219). Yet, Poland does not stop there; there is yet another feature in the Polish constitution that allows for early dissolution: new elections will be called if the annual budget is not passed within four months after its submission to the Sejm (Poland, 2010). Similarly, there is also a clause in the Hungarian constitution that requires that the budget pass before March 31 or else parliament is dissolved (Comparative Constitutions Project, 2013a).

Spain has the most easily achieved dissolution rule as Articles 62 and 64 grant the King power to dissolve the Cortes so long as the prime minister countersigns for the dissolution. The emphasis on prime ministerial advice for dissolution is set out in Article 115 which states that the prime minister may “under his or her sole responsibility... propose the dissolution of the Congress, the Senate or the Cortes Generales” to the King, who will follow the proffered advice (Comparative Constitutions Project, 2013b). Therefore, in Spain, the prime minister retains the virtual right of dissolution that Canadian prime ministers currently enjoy.

### *The Uses of Constructive Non-Confidence*

Table 4 (below) displays the use of constructive non-confidence to date in the six European democracies that have adopted it, placing that use in the context of the number of elections and cabinets that have occurred since constructive non-confidence was adopted. The table also displays the early elections that have occurred under the safety-valve provisions. As Table 4 demonstrates, constructive non-confidence has been used sparingly in five of the six



European democracies that have adopted it. The exception is Belgium, which has never made use of the resignation rule. In the countries where constructive non-confidence has been used – a total of twelve occasions – it has been employed in two different ways: first, to engineer a mid-term government transition including a change in the governing parties (either a partial change or a full change), and second, to change the head of government without any change to the composition of the governing parties. The majority of the uses of constructive non-confidence have been the former use (ten), but the constructive non-confidence has been used in Poland and Hungary for the latter goal (two).

**Table 4: Executive Stability, Early Dissolution, and Constructive Non-Confidence in Six European Countries**

	Belgium (1995- 2013)	Germany (1949- 2013)	Hungary (1989- 2013)	Poland (1992- 2013)	Slovenia (1991- 2013)	Spain (1978- 2013)
Elections	5	18	6	6	6	10
Cabinets <sup>19</sup>	9	30	9	12	14	11
Early Dissolutions	3	3	0	2	2 <sup>20</sup>	6 <sup>21</sup>
Constructive Non- Confidence Votes	0	2	1	4	3	2
Successful Constructive Non- Confidence Votes	0	1	1	1	3	0

<sup>19</sup> A new cabinet is counted for every general election, change of party membership in cabinet, or the appointment of a new prime minister.

<sup>20</sup> This number includes the 1992 early election which was provided for in Slovenia's post-independence constitution.

<sup>21</sup> The Spanish constitution allows the president of the government (the prime minister) to ask the monarch for an early dissolution (Comparative Constitutions Project, 2013b).

The first way of using constructive non-confidence – i.e., to achieve a mid-term change in government – is the expected outcome of the system given that it was created to structure opposition behaviour by making it “responsible” and “constructive” and so protecting the executive. As such, it is unsurprising that a majority of the resignation rule’s uses fall within this category. Not all of the constructive non-confidence votes of this category succeeded, which is also to be expected given that changing the government is far riskier than simply changing the head of government without altering the party make-up of the government. In Germany constructive non-confidence motion was narrowly defeated in 1972, but then successfully used in 1982. In contrast, all of three Slovenian uses (1992, 2000, and 2013) did result in a change of government. By contrast, the other four uses – two in Spain in 1980 and 1987 and three in Poland in 2012 and 2013 – failed (indeed, they were introduced without the expectation of success by opposition parties who exploited the resignation rule mainly to raise their public profile (Real-Dato and Jerez-Mir, 2009).

The first use of the constructive vote of confidence was on April 24, 1972 in Germany. The Christian Democrats (CDU) and their Bavarian counterparts, the Christian Social Union (CSU), sought to elect Rainer Barzel to the chancellor’s office by convincing the Free Democrats (FDP) to leave the coalition government with the Social Democrats (SPD).<sup>22</sup> The primary reason behind the CDU’s introduction of the censure motion was Brandt’s Ostpolitik, which was the government’s attempt to re-engage with East Germany. The CDU suggested that the policy of Ostpolitik betrayed Western solidarity in exchange for a radical turn towards the East and that it would precipitate Weimar-like crises (Morgan, 1972: 352). While the CDU had over-stated the case, it did have reason to believe it might succeed because the SPD-FDP majority had started to shrink shortly after the 1969 election as right-wing members of the FDP defected (Morgan, 1972: 353). The attempt failed by two votes and the SPD’s Willy Brandt retained his position as chancellor (Roberts, 2009: 129).<sup>23</sup>

However, Brandt’s survival was tempered by his very slim and declining majority and the CDU’s refusal to work with the government (Morgan, 1972: 356-357). Brandt’s troubles were

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<sup>22</sup> At the time, the CDU and SPD were the two dominant parties in the German party system while the FDP, as the third party, played the role of kingmaker. This lasted until the emergence of the Greens in the 1983 and 1987 elections and then the Die Linke after unification.

<sup>23</sup> In 1972, only 247 members voted for the motion out of 496 (Germany, 2010b).

made worse by the Basic Law's fixed parliamentary term and the removal of the "right to dissolution." Without the ability to advise dissolution, Brandt decided to exploit the loophole provided by Article 68 of the constitution, which, as we have seen, allows dissolution after a loss of a vote of confidence initiated by the government. Therefore, Brandt asked for the Bundestag's confidence, engineered his own defeat, and asked the president for new elections (Morgan, 1972: 355).<sup>24</sup> While the crisis was resolved, Brandt blatantly violated the spirit of the constitution and its fixed parliamentary term. Constructive non-confidence, with its logic in favour of mid-term transitions, was circumvented in favour of a loophole allowing the chancellor to engineer an early election.

The second attempted constructive non-confidence vote in Germany, and the only successful one to date in that country, was October 1, 1982. This time, the CDU-CSU opposition was successful at orchestrating a change in the governing coalition as they lured the FDP away from the SPD. Various factors led to the incumbent chancellor Schmidt's downfall, including his loss of authority over the SPD deputies and the Chancellor's Office, the growing policy gap between the SPD and FDP, and the economic changes buffeting the country (Padgett, 1994: 63). The coalition had stayed together as long as it did (from Brandt's resignation in 1974) because Schmidt had worked hard to remain independent from the more left-leaning elements of his party to appeal to the FDP (Padgett, 1994: 67). Still, there remained little doubt that the SPD was losing its focus,<sup>25</sup> leading the FDP to worry that their party was being dragged down by their coalition partner. Therefore, the FDP leadership provoked Schmidt into dismissing the FDP ministers, which caused the SPD-FDP coalition to collapse (Hall, 1982: 413). So, when the CDU offered the FDP an alternative, the majority of the latter party was willing to break with the SPD and endorse Kohl for chancellor – but with one caveat: Kohl had to use Article 68 to engineer a new election. The FDP felt that a new election was needed to sanction their change in support

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<sup>24</sup> According to one interpretation, Brandt was able to capitalize on the fact that the voting method for constructive non-confidence in Germany is a secret ballot. Therefore, Brandt only allowed a few 'secure' supporters to participate and had the rest of his (and the FDP's) MPs abstain so that the secret ballot reduced the risk of defection within his supporters and encouraged it from the Barzel camp (Bergman et al, 2003: 156).

<sup>25</sup> The SPD was internally divided and was losing popular support, including amongst its traditional core supporters. Much of this was driven by the party compromising its agenda on numerous issues in order to sustain its coalition with the FDP. The SPD appeared to have lost its way, "too wrapped up in its own affairs to determine trends or grasp new issues. The resulting gap between party and government widened and increasingly deprived Chancellor Schmidt of the backing he needed to govern" (Hall, 1982: 411).

from the SPD to CDU because they had campaigned in the 1980 election on supporting the former party (Sutherland, 1994: 29-30). Thus, the constructive non-confidence vote passed in 1982 with eight votes more than the required 248<sup>26</sup> and as promised to the FDP, Kohl followed through by introducing a vote of confidence under Article 68 to engineer new elections. In effect, this successful mid-term transition was actually a temporary expedient to secure a Brandt-like manipulation of section 68 to secure another early election.

The 1982 episode ultimately shows that if the opposition is united on an early dissolution, it can come together to defeat the incumbent administration, form its own government and then propose a confidence vote to secure an election. In fact, the kind of stable mid-term transition contemplated by Article 67 of the Basic Law has never occurred. Since 1982, there have been no attempts to use Article 67 although the Article 68 loophole has been used several times, such as Chancellor Schröder's achievement of an early election in 2005 through directing some of his own SPD members to vote against him so that his government would deliberately lose confidence (Roberts, 2009: 223).

Slovenia has made slightly greater use of the constructive non-confidence rule – three uses and all successful. The transition to independence was largely managed by the politically diverse DEMOS coalition, which formed the first democratically elected Slovenian government in 1990 under Lojze Peterle. Once Slovenia became independent in 1991, DEMOS began to crack; the coalition was too politically heterogeneous and its infighting led to some parties to defect (Rizman and Ramet, 2006: 69). By the spring of 1992 it was clear Peterle's support was fading and on April 22, the National Assembly used the constructive vote of non-confidence to elect Janez Drnovšek of the Liberal Democrats (LDS) as the new prime minister. He formed a coalition government with the Social Democratic Party of Slovenia, the Democratic Party, the Greens of Slovenia, the United List of Social Democrats, and the Socialist Party (Rizman and Ramet, 2006: 69). His government remained in office for the rest of the year until elections were held. Though these were early elections, they were mandated by the 1991 Slovenian constitution (Bebler, 2002: 1333).

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<sup>26</sup> The censure motion passed with 256 votes (out of 495) from the CDU, CSU, and FDP while the SPD and dissenting FDP members voted against it.

Drnovšek's LDS came out ahead in the 1992 and 1996 elections and he formed a government each time. It was during his second full term that his governing coalition ran into trouble – the Slovene People's Party withdrew from the coalition leaving Drnovšek exposed. He fell in a constructive vote of non-confidence on April 8, 2000 that designated Andrej Bajuk as his successor. Bajuk was able to form a coalition between the Slovene People's Party, the Slovene Christian Democrats, and the Social Democratic Party (Rizman and Ramet, 2006: 72). Although the mid-term transition was seen as preparation for the upcoming October, 2000 elections (Wright, 2000), the coalition spent much of its time bickering over policy direction and Bajuk himself split with his party, the Slovene Christian Democrats. While Bajuk remained the prime minister until the 2000 elections, his coalition did not survive and Drnovšek returned to the prime minister's office (Rizman and Ramet, 2006: 72-73).

The third Slovenian use of constructive non-confidence in 2013 unfolded during a time of public disillusionment with political elites and economic uncertainty. Corruption investigations had been launched involving a number of high-ranking politicians, including Prime Minister Janez Janša, by the Corruption Prevention Commission. Despite public protest, Janša refused to resign – even as his coalition partners melted away. The Civic List Party quit the government on January 24, 2013, followed by DeSUS on February 22, and finally the SLS on February 25 (The Associated Press, 2013; “DeSUS Leaves,” 2013; “SLS Formally Leaves,” 2013). Some of these parties now in opposition chose to join Positive Slovenia in a constructive non-confidence motion that removed Janša for Alenka Bratušek on February 27. She formed a coalition government of Positive Slovenia, the Social Democrats, the Civic List, and DeSUS (“Slovenia's New Prime Minister?,” 2013), and looks to remain in office until the next election.

Compared to the uses in Germany and Slovenia, the motions for a constructive mid-term change in government in Spain and Poland were made without any expectation of success. The opposition parties in both countries used the vote as a tactic to increase their publicity. In 1980, the Spanish PSOE brought a motion of constructive non-confidence against Prime Minister Suarez to get much needed exposure for their leader Felipe Gonzalez, without any expectation of actually defeating and replacing the government. Similarly, in 1987, the Popular Alliance brought a motion of constructive non-confidence against Prime Minister Gonzalez (Real-Dato and Jerez-Mir, 2009: 104; Juberias, 2003: 581), despite the fact that Gonzalez's PSOE formed a

single-party majority government, making it nearly impossible for the Popular Alliance to succeed. Clearly, the aim was publicity for the Popular Alliance rather than actual defeat of the government. The 2012 and 2013 votes in Poland were very similar to the 1987 Spanish vote because the governing coalition held a secure majority in the Sejm. The Law & Justice party sought to use the resignation rule on October 12, 2012 to express their solidarity with the popular unrest sweeping the country against toughening economic realities and proposed a non-partisan candidate with an extensive economic background to head a new government (Bartyzel and McQuaid, 2012). But Prime Minister Donald Tusk's coalition of the Civic Platform (CO) and Polish Peasant Party (PSL) held firm as expected, and continued to remain united in government when Law & Justice tried again on February 15, 2013 ("Constructive No-Confidence Motion in Tusk," 2013; "No-Confidence Vote," 2013).

The third use of constructive non-confidence for a mid-term change of government was in 1997, but it, like its 2012 and 2013 successors, was introduced for strategic reasons. The Democratic Left Alliance (SLD) and Polish Peasant Party (PSL) coalition had survived in office since 1993 but by 1997, the smaller PSL were concerned about their electoral chances in the upcoming fall elections. Despite the fact that the PSL remained formally in the coalition government, they tabled a constructive non-confidence motion on August 21, 1997 against Włodzimierz Cimoszewicz, the SLD prime minister, to try and distance themselves from their coalition partner. The ploy failed both in the Sejm and in the subsequent elections (Sanford, 2002: 150).

There are two cases that fall into the second category of constructive non-confidence uses – that of a mid-term change to the head of government without any change in the governing coalition. The first is from Poland and it is chronologically the first Polish use of the resignation rule. In 1995, Poland had yet to pass the 1997 constitution and was still operating under the so-called "Little Constitution" of 1992, which allowed the president to veto government proposals, and even call new elections if the budget was not passed within the allotted time period (Millard, 1999: 46). The then president, Lech Wałęsa, regularly clashed with the PSL-SLD government headed by Waldemar Pawlak, which he felt was not proceeding fast enough on economic reforms. President Wałęsa prompted the 1995 crisis by vetoing the government's budget so that it would not pass within the constitutionally prescribed three-month period. Because this period

had expired, Wałęsa demanded the PSL-SLD coalition replace Pawlak or face the dissolution of the Sejm (Millard, 1999: 46). In order to pre-empt an early dissolution, the PSL-SLD coalition used constructive non-confidence to remove Pawlak from office and replaced him with Józef Oleksy of the SLD, who they hoped would fare better in dealing with Wałęsa. By using the constructive vote of confidence, the PSL-SLD coalition reinforced its position vis-à-vis Wałęsa, showing that the government still controlled a parliamentary majority (Bernhard, 2005: 241). Unfortunately for Oleksy, he resigned after a year when he was linked to a political scandal and the PSL and SLD replaced him with Włodzimierz Cimoszewicz, who remained in office for the rest of the parliamentary term (Bernhard, 2005: 225-226).

Hungary is the second country to apply constructive non-confidence to a mid-term change in the head of government. After the 2006 elections, the Socialists (MSzP) had formed a coalition government with the smaller Free Democrats (SzDz), but 2008 the SzDz broke with the MSzP and left them to continue on with a minority government. As a leader of a minority government, the MSzP Prime Minister, Ferenc Gyurcsány, relied on the SzDz for parliamentary support for as long as he could. His popularity and hold on power collapsed in 2008 as it became increasingly obvious that he was unable to pass much-needed economic reforms (“Hungary parties back Bajnai,” 2009). This prompted his resignation and the search for a new MSzP candidate for the prime minister’s office. Reliant on the SzDz as the MSzP government was, it needed a candidate that would satisfy the Free Democrats. The two parties settled on Gordon Bajnai and used the constructive non-confidence vote on April 14, 2009 to remove Gyurcsány from office and elect Bajnai to lead the minority government, therefore using the resignation rule as an investiture vote for a prime ministerial mid-term transition (“Hungary parties back Bajnai,” 2009). While this case and the Polish one above were both mid-term transitions without a change of government, constructive non-confidence was used to formally secure confidence for the incoming prime minister and satisfy the investiture requirement for incoming prime ministers.

Of the six European countries that have entrenched constructive non-confidence, only Belgium<sup>27</sup> has never made use of it. Moreover, of the twelve cases discussed (and summarized above in Table 4) only six were successful (in the sense that the non-confidence votes passed).

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<sup>27</sup> The infamous Belgian instability is due to the difficulty in the government formation process. Once a government is formed, which can take months, it generally is able to retain office.

Two of these (Poland, 1995 and Hungary, 2009) produced mid-term changes of the head of an incumbent government, rather than a change of government to a new coalition. Thus, of the 12 instances, only four have resulted in true mid-term changes of government (Germany, 1982, and Slovenia in 1992, 2000, and 2013), and it is only the most recent use of constructive non-confidence in Slovenia in 2013 that has proven lasting. Bratušek's government continues to hold power but whether it can survive until the next elections, which are set for 2015, remains to be seen. The other three mid-term government transitions installed governments that only lasted on average six months each: in Germany, the Bundestag was dissolved almost two years early whereas in Slovenia, the National Assembly's term was about to expire in both 1992 and 2000.

Clearly, constructive non-confidence is used infrequently by the six European countries that have implemented it. Adding up the years the system has been in use in the six countries yields a total of 184 years. In all those years constructive non-confidence votes have been attempted only twelve times. More astounding, only one of twelve votes (Slovenia in 2013) has been used in the manner originally contemplated by its German originators, namely, to produce a relatively lasting mid-term government transition. Granted, non-confidence votes are rare occurrences in parliamentary systems because they are the most extreme means available to the legislature to enforce government accountability. Yet constructive votes are rarer than negative non-confidence votes for the obvious reason that the onus is on the backers of the constructive motion to propose an alternative government (De Winter, 1995). This means that the constructive requirement promoted parliamentary as well as executive stability by encouraging parliaments to manage legislative business and government scrutiny without resorting to constructive non-confidence. For example, in Germany, Diermeier, Eraslan and Merlo find that constructive non-confidence has increased average government duration in Germany by 12 percent (2002: 903).

Based on Table 4, it is also noticeable that early elections too are irregular – a result of the constitutional requirement of fixed parliamentary terms that is part of the constructive non-confidence package. However, while each country has some form of a motion of confidence similar to Germany's Article 68, there are also additional safety valves in different countries. For instance, the Spanish prime minister retains the right under Article 115 of the constitution to advise the King to dissolve the Congreso early (Comparative Constitutions Project, 2013b). This



has resulted in the early dissolution of more than half of the Spanish parliaments since 1978. In Belgium, the legislature there has made use of its safety valve too, ending three of five parliaments since 1995 early due to its complex political context and difficulty with government formation. If Spain and Belgium are ignored, on average only 10.24 percent of German, Hungarian, Polish and Slovenian cabinets ended as the result of early elections, no mean feat considering every cabinet but one<sup>28</sup> was either a majority coalition, minority coalition, or a single-party minority government.<sup>29</sup>

The infrequent use of the resignation rule indicates that constructive non-confidence does steady the executive branch against confidence votes as its creators intended. Even though all six of these countries use some form of proportional representation, which generally results in hung parliaments, coalition and minority governments manage to survive because of the extra hurdle placed on the opposition by the positive resignation rule.

#### *Some Effects of Constructive Non-Confidence*

To conclude this section on constructive non-confidence and its experiences abroad, it is worth summarizing the discussion with some implications of the resignation rule. Some of the implications, especially those from Germany and Spain, will be dealt with later in Chapter Five and Six and so will only be touched on briefly here. The first major implication is that constructive non-confidence makes it more difficult to hold the government accountable by withdrawing confidence. There are high transaction costs for parties and their deputies as they need to find an absolute majority within the legislature to support a new government, not to mention come to an agreement about what party or parties will form the potential new government. And the potential new government is an unknown factor, meaning that individual deputies might prefer to remain with the status quo – especially for government backbenchers (Bergman et al., 2003: 157). Consequently, the first major implication is that the ultimate “weapon” that MPs can use against the sitting cabinet is effectively tamed. This is the price of executive stability.

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<sup>28</sup> This was the Adenauer cabinet of 1960. The CDU-CSU had won an absolute majority of the Bundestag seats in the 1957 election but did spend most of the third Bundestag in different coalitions.

<sup>29</sup> Spain and Belgium double the average, making the average 21.47 percent.

Second, constructive non-confidence cannot by itself blunt the power of the prime minister in a parliamentary democracy. The case has been made by Aucoin, Jarvis and Turnbull (2011) that constructive non-confidence reduces the power of the prime minister because without the constant threat of losing confidence, deputies have more leeway to vote against the government. Yet how true this assumption is remains unclear as countries with constructive non-confidence also have problems with prime ministerial power. This is no clearer than in Spain, where the prime minister (or president of the government) is able to dominate his or her cabinet and party as well as the parliament. In Germany, the chancellor does not dominate to the same extent because the party candidate for the chancellorship is not the party leader as is the case in Canada – the two offices can be combined but are not always. When the chancellor does hold the party leadership, he or she is in a much stronger position relative to the party caucus.<sup>30</sup> In fact, the power of the chancellor during the first few decades of the Federal Republic led to Germany being labeled “chancellor democracy” or *Kanzlerdemokratie* (Niclauss, 2004).

All countries that have adopted constructive non-confidence are consistent with the German viewpoint that the resignation rule is part of a complete package that includes fixed election dates and the ability of the prime minister or government to ask for a vote of confidence. The government-initiated vote of confidence – Article 68 in the German system – is intended to provide symmetry so that neither the opposition nor the government lacks the ability to test where the legislature’s confidence lies. Of course, in Germany and the other constructive non-confidence countries, the presence of a vote of confidence has in fact created asymmetry as a prime minister who retains confidence but desires an early dissolution can engineer the government’s defeat on the motion. That places a powerful institutional weapon in the hands of the prime minister and the executive to engineer an early election without giving the legislature the equivalent ability to force an early election. However, it is possible for legislature to turn around a confidence vote and make it a constructive vote of non-confidence – if they can agree on a new government. As noted above, this is unlikely and to date no such reversal of a confidence vote has occurred in any of the six countries. This asymmetry in the power to call

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<sup>30</sup> In Spain the parties nominate their party leaders as candidates for the office of the prime minister, as is the case in Westminster parliamentary systems. However, in Germany parties nominate a member of their party to run for the chancellorship and that individual can either be the party leader or not – and if not, he or she can run for the party leadership at another date to combine the office of party leader and chancellor.

early elections is even stronger in Spain as the Spanish prime minister has the same “virtual right of dissolution” that exists in Canada – the prime minister must simply request that the King dissolve the Congreso and the King will comply unless confidence is unclear (Comparative Constitutions Project, 2013b). Consequently, the asymmetry can only be overcome if the opposition is willing and able to secure a constructive non-confidence vote for a mid-term transition in anticipation of a Spanish prime minister’s dissolution request.

## **Conclusion**

This chapter has endeavoured to show the range in different types of confidence votes, from negative to constructive non-confidence votes. The categorization of resignation rules in Table 2 helps conceptualize the reform proposals for the confidence convention in Canada: if Canada moves away from the traditional negative confidence vote towards the middle or the right side of Table 2, the confidence convention becomes more rule-bound to the point where it is no longer a convention but is entrenched in the constitution. However, the middle area of the New Zealand protocol features enhanced parliamentary stability without fully binding the confidence mechanism.

The other purpose of the chapter was to explore the New Zealand protocol and constructive non-confidence in greater detail, including how they have worked abroad. The New Zealand protocol has clarified the conventions that make responsible government function properly, ensuring the neutrality of the governor general, the central role of the confidence convention, and parliament’s ability to decide on government formation and transition. The encouragement of constructive voting by rank ordering mid-term transitions ahead of an early election when confidence is unclear or lost ensures that triggering early elections is not a readily available tool – for both the government and the opposition – to destabilize parliament. However, there is no requirement to enforce constructive voting as is the case with constructive non-confidence, so confidence motions in New Zealand are still formally negative votes of confidence. Of course, the short three-year parliamentary term in New Zealand has meant that the New Zealand protocol has not been significantly tested since the introduction of MMP. The disintegration of the National-New Zealand First coalition in 1998 is the sole exception; National

remained in office heading a single party minority government. Since elections are frequent enough, there is little incentive to force early elections.

The limited use of constructive non-confidence in the six European countries that have implemented it highlights the difficulty and thus the impracticality of using it to control the government. Constructive non-confidence is on the right side of Table 2 because it is the opposite of negative votes of confidence that both deconstruct governments and are inherently flexible. For example, in Canada, negative confidence votes can happen because government budgets or significant legislation is defeated or if the opposition introduces a motion that condemns the government. Yet, under constructive non-confidence, flexibility is not a prized feature of the confidence mechanism which limits the options for its introduction. The German Basic Law (along with the other five constitutions) bears this out: votes of confidence initiated by the opposition must be constructive and defeats on any government legislation are not indicative of the Bundestag's lack of confidence. A negative vote of confidence can only be introduced by the government, and is designed only to be used in situations of political deadlock, such as in 1972 when the Brandt ministry was unable to pass its budget. Instead of flexibility and parliamentary control of government, this chapter cannot stress enough the original intention for constructive non-confidence. The constructive vote of non-confidence was incorporated into the German and then the Spanish constitution to defend parliamentary democracy against anti-system elements and subsequently stabilize the executive branch.

Using Table 2, as one moves from left to right, the degree to which the confidence mechanism is rule-bound increases. This represents the radicalization of reform suggestions for parliamentary instability in Canada as discussed in Chapter Two. The New Zealand protocol, originally proposed in 2004 by Aucoin and Turnbull, was the first reform proposed to clarify the confidence convention and would only shift Canada one step into the semi-constructive category. But with the prorogation crisis in December 2008, the reformers concluded that encouraging constructive voting was not sufficient. Instead, as the 2004-2011 minority period came to an end, Smith and Aucoin (2011) and Aucoin, Jarvis and Turnbull (2011) advocated constructive non-confidence. Remaining in the middle of the range in non-confidence votes described in Table 2 provides too much of an opportunity for politicians acting in bad faith and manipulating the

constitutional conventions for their own partisan ends. Hence, rigid confidence rules are deemed a necessity.

But proposing these reforms for Canada leads one to ask the following questions. To what degree would the reforms have made a difference in the recent political controversies? And, will the reforms, especially the more constitutionally invasive reform of constructive non-confidence, achieve the intended goals? Will they stabilize minority government and if so, at what cost? These questions are addressed in the next three chapters.

## CHAPTER 4: FOUR RECENT CANADIAN POLITICAL CONTROVERSIES AND THE TWO REFORMS

In 2011, Canada emerged from its longest run of minority government. During this period, commentators continually decried the extreme partisanship and political games that characterized the atmosphere in the House of Commons. Both the government and the opposition sought to find ways to embarrass each other – and force an early election – while blaming the other side for the instability. In the process, four political controversies occurred<sup>31</sup> which provide test cases for the two reforms under discussion in this thesis. The first controversy is the May 10, 2005 questionable confidence vote against the Martin government where the opposition claimed they had defeated the government and the government refused to acknowledge the vote as a confidence vote. The second issue is the September, 2008 early election call that led to the abandonment of fixed-date legislation for minority governments. The third controversy was perhaps the most exciting: the 2008 constitutional crisis that unfolded after the fall fiscal update to include the proposed Liberal-NDP coalition, another early dissolution threat and finally prorogation. Last is the March, 2011 early dissolution that resulted from the censure of the Harper government for being in contempt of parliament.

The New Zealand protocol and constructive non-confidence were both recommended for Canada because of their abilities to curtail early or “snap” elections and stabilize minority government. Thus, this chapter asks how the New Zealand protocol or constructive non-confidence would have addressed the four controversies. To answer this, the chapter engages in a counterfactual thought experiment that replays history to determine whether an alteration in the constitutional conventions via the New Zealand protocol or amending the constitutional to entrench the constructive non-confidence reform package would have changed the course of the four political controversies. And if the reforms could have altered the course of history, would it have resulted in more parliamentary stability and fewer early elections?

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<sup>31</sup> The September 9, 2004 letter from the three opposition leaders to Governor General Clarkson is not included in the counterfactual analysis because it was simply the case of the opposition expressing its desire to make minority government work. Harper, Layton and Duceppe discuss the hypothetical possibility of the Martin government losing confidence but because their letter is released prior to the opening of the 38<sup>th</sup> Parliament, there is no actual event to analyze regarding the impact of the New Zealand protocol and constructive non-confidence on parliamentary stability.

## **The May 10, 2005 Vote of Confidence**

The events of Canada's 38<sup>th</sup> Parliament highlighted the breakdown in the consensus regarding what constitutes a vote of confidence. A fierce controversy erupted on May 10, 2005 when the House approved a tortuous motion that dealt with a committee report. As noted in Chapter Two, the motion was an amendment to another motion instructing the Standing Committee on Public Accounts to amend its report to include a recommendation that the government resign (Aucoin et al., 2011: 96). Prior to the vote, spokespersons for the Conservatives, Bloc Quebecois, and the NDP all announced that their parties were treating the motion as a confidence vote (Heard, 2007: 400). The government responded by stating that all of the motions leading up to and including the May 10 vote were primarily procedural devices that could not be considered votes of confidence. The reason for this was that the motions were simply instructions to the Standing Committee on Public Accounts and including statements in such instructions that recommend the government's resignation could not constitute the House's withdrawal of confidence (Heard, 2007: 403). Moreover, Prime Minister Martin argued that the Conservatives' amendment could not count as a test of confidence because its intent remained unrealized until the Standing Committee actually voted to incorporate the recommended statement and then resubmitted the report to the House of Commons (Aucoin et al., 2011: 96).

In any event, the government delayed the confidence issue by holding onto power until a completely unambiguous confidence vote was held on the budget 9 days later. During this delay, as we observed in Chapter Two, the government secured enough support – including floor-crossing votes and a tie-breaking vote by the Speaker – to retain confidence, at least temporarily.

Not everyone was satisfied that the government's position on confidence votes and its delaying tactic were legitimate. That the opposition parties had clearly portrayed the May 10 vote as withdrawing confidence, and that the past governments had treated procedural motions as confidence votes put the government on the wrong side of the issue for some commentators (e.g., Heard, 2007; Aucoin et al., 2011). Heard admits that confidence motions that fall into the third category of confidence votes – those initiated by the opposition to signify explicit withdrawal of confidence – are often hard to define. Moreover, because they are based in convention, their definition can change over time or the earlier consensus on how they are defined can break down. Such was the case in May 2005, according to Heard, because previous successful

confidence votes had been too historically removed, too far in the past to be easily remembered. In particular, it had been forgotten that the King government had fallen on a similar recommendation to a House committee in 1926 (Heard, 2007: 396; 412). Thus, while Heard concludes that the Martin government had wilfully ignored a confidence vote on May 10, 2005, he concedes that it had become easier for governments to do so because the consensus on the technicalities of confidence votes had broken down.

The proposals to bring to Canada either the New Zealand confidence protocol or European-style constructive non-confidence are, of course, intended to establish a new, and clear, consensus on the technicalities of confidence votes. Had either of these reforms been in place, what effect would it have had on the controversy in early May of 2005?

#### *The New Zealand Protocol*

The New Zealand Protocol does not contain any specific sections that deal with what constitutes a motion of non-confidence. Instead the protocol focuses on what to do precisely when the issue of confidence becomes unclear or controversial. In such circumstances – i.e., in the kind of situation that arose in Canada in May 2005 – section 6.55 of New Zealand’s Cabinet Manual requires the government “to clarify where the confidence of the House lies, within a short time frame (allowing a reasonable period for negotiation and reorganisation)” (Cabinet Manual, 2008: 83). Presumably this requires the government to hold a clear and unambiguous confidence vote “within a short time frame.” This section seems implicitly to acknowledge the likelihood that the effective loss of confidence will sometimes be a matter of controversy, and thus the possibility that a true test of confidence may take a period of time – though a “short time” – rather than being effected in a single moment. In other words, the New Zealand protocol appears to acknowledge the legitimacy of precisely what happened in Canada in 2005 when the Martin government held what everyone acknowledged was an explicit confidence vote – i.e., a vote on the budget – a few days after the controversial May 10 vote.

Of course, if the later vote “clarified” that confidence had indeed been withdrawn by the earlier one, this would mean that a government would have remained in power – albeit only “within a short time frame” – without the support of the confidence chamber. The New Zealand Cabinet Manual handles this problem by insisting that a government without clear confidence act



only in a “caretaker” capacity. Under this “caretaker” convention, government cannot take on any significant new policy initiative or decision without the House’s support, either for the government generally or for a specific matter (Cabinet Manual, 2008: 9; 78-79; 84). An election period is one circumstance in which the incumbent government lacks clear confidence (because it might be defeated) and is thus subject to the caretaker convention. Another caretaker circumstance is the “short time frame” between a vote that ambiguously calls confidence into question and the “clarifying” vote the government is obliged to call under section 6.55 of the Cabinet Manual. Here again, the Martin government appeared to act in the manner contemplated by the New Zealand protocol. Between May 10, when its confidence was called into question, and May 19 when confidence was confirmed, the Martin government did not introduce any new policies but instead remained focused on addressing the confidence issue and finding a way to get its budget through the House of Commons.

In sum, had the New Zealand protocol been in place in Canada in May 2005, it would not have changed the outcome of the confidence controversy that occurred then. Indeed, it would arguably have confirmed the legitimacy of the Martin government’s course of action during the “short time frame” between May 10 and May 19.

But what if the Martin government had lost the May 19 budget vote? Without the New Zealand protocol, the most likely result would be new elections. Had the New Zealand protocol been in place, it would have promoted the search for an alternative mid-term transition, imitating a constructive vote of non-confidence. In May, 2005, given that the NDP had already pledged to support the Liberal budget, the available alternative government would have involved some kind of alliance between the Conservatives and the Bloc Quebecois. Although this is technically possible, it seems highly unlikely that these two parties could have agreed to a viable governmental arrangement. And when no viable alternative government emerges, the New Zealand protocol clearly contemplates new elections. Therefore, even with the protocol, the most likely outcome would have been new elections.

### *Constructive Non-Confidence*

New elections, of course, are precisely what the constructive non-confidence package proposed by Aucoin, Jarvis and Turnbull (2011) is designed to prevent. While the New Zealand

protocol *promotes* “constructive” mid-term transitions, constructive non-confidence *requires* them. It is for this reason that constructive non-confidence allows only one type of non-confidence vote, namely, a motion that simultaneously declares a lack of confidence in the incumbent administration and names a new head of government. This kind of vote must obviously be direct and clear in a way that would not leave room for the kind of ambiguity that arose concerning the May 10, 2005 vote. Among other things, a constructive non-confidence requirement would have avoided the entire procedural versus substantive debate that occurred in 2005. A constructive non-confidence vote would, by definition, have to be direct and substantive.

None of the motions made by the Conservatives during early May, 2005 would have constituted such a constructive non-confidence vote. While the opposition parties could freely have recommended that the Standing Committee amend its report, such a change to the report, even after being adopted by the House, would have shown disdain for the government but would not have removed it from office. Rather, a proper constructive non-confidence motion would have required an agreement among the opposition parties to assume power after defeating the incumbent Liberals. Such an agreement could take the form of a true coalition government (in which coalition members hold cabinet positions) or an alternative minority government with agreed-upon support by allied opposition parties who do not sit in cabinet. In either case, constructive non-confidence would, in practical terms, have required the construction, *prior to any non-confidence vote*, of a Conservative-led government with the stable support of the Bloc to maintain confidence.

To sum up, regarding the “curious case of May 10, 2005” (Heard, 2007: 395), the New Zealand protocol would not have resulted in any changes. The government would have been allowed to remain in power and would only have violated the New Zealand protocol if it had not sought to resolve the confidence controversy as soon as possible. Since this did not occur, the New Zealand protocol was essentially followed and an early election avoided. In comparison, the presence of constructive non-confidence would have ensured that none of this came to pass; it would have censured the censure motion. After all, it did not seem that the Conservatives were interested in forming a government through a mid-term transition. For instance, after the motion

passed on May 10, Harper claimed in the House that the Liberal government had three options in response to the confidence vote:

By all of the established conventions of our democratic system, when the Government faces a clear vote on such a question, it is required to do at least one of three things: it is required to fulfill the terms of the motion and resign; to seek dissolution; or at the earliest moment, to ensure that it indeed has the confidence of this chamber, which is the only democratic mandate this Government has to spend our public money. Mr. Speaker, since the Government has refused to follow either of the first two courses of action, I would challenge the prime minister, if he believes he has the constitutional authority to govern, to rise in this place and call for a vote of confidence (Canada, House of Commons, 2005 cited in Heard, 2007: 403).

In this statement there is no mention by the Leader of the Opposition that there is an alternative government or even that a mid-term transition is possible. The closest that Harper gets to the issue is that the government has the option to resign. So, it is possible to suggest that while the Conservatives were agitating against the Liberal government, it seems unlikely that they would have gone as far as proposing a constructive vote of confidence in the spring of 2005. Constructive non-confidence would therefore have been successful at stabilizing the Martin minority government.

### **The September 2008 Early Dissolution**

In 2007, the Conservative minority government successfully enacted fixed-date legislation that set the next federal election to October, 2009 and then every subsequent one to four year intervals after the previous election. In the context of Canada's dominant tradition of majority government, where the minority opposition has no power to trigger new elections, fixed election dates serve to remove the prime minister's virtually exclusive control over the time of elections. In other words, fixed election dates in majority-government circumstances overcome the highly asymmetrical, and thus arguably unfair, situation in which the government has all the control over election timing and the opposition has none. In minority government situations something closer to symmetry traditionally prevails because the opposition can also trigger early elections by defeating the government. This too was a situation of electoral instability – indeed,

typically more unstable than in majority government situations – but it was a more “symmetrical instability” (Knopff and Piersig, 2012).

In majority-government circumstances, fixed election dates establish symmetry by reducing the government’s discretion regarding election timing to the same level – i.e., none – that traditionally applied to the opposition. Both sides now have to live with legally-defined fixed-dates. The result is symmetrical stability (Knopff and Piersig, 2012).

But what is the effect of fixed-dates in minority-government circumstances? When the legislation was debated in the House of Commons, it appeared that it would apply to all governments, regardless of whether they were minorities or majorities (Heard, 2010: 136-137). However, as the 39<sup>th</sup> Parliament progressed, it became clear that in minority-government circumstances fixed-date legislation placed the political advantage in the hands of the opposition, which retained its ability to force an early election at any time by defeating the minority government. If the legislation tied the hands of a minority prime minister with respect to election timing but left the opposition free to trigger early elections, it would in effect have re-created the situation of asymmetrical instability that traditionally prevailed in majority circumstances, but with all of the discretion now held on the other, opposition side of the parliamentary aisle. Unfair partisan advantage would not have been overcome; it would simply have switched sides (Knopff and Piersig, 2012: 5).

Unsurprisingly, the Conservative government responded to this situation with the argument that the fixed-date legislation applied only in majority government situations – where it would still reduce prime ministerial power in terms of snap elections without giving new election-triggering power to the opposition – and not in minority government circumstances (Aucoin et al., 2011: 64-65). The government did not deny the opposition’s right to trigger new elections by defeating a minority government, but it insisted that the Prime Minister retained a symmetrical discretion over elections. The Prime Minister’s power remained in such situations because, as noted in Chapter Two, the governor general’s discretion over election timing was not – and constitutionally could not be – limited by the fixed-date statute. Therefore, a prime minister could still legally ask for an early dissolution and a governor general would most likely act on that advice.

From this perspective, fixed-date legislation could not have been intended simply to shift asymmetrical fairness from one partisan side to the other, and thus applied to neither side in minority government circumstances. That is, the traditional game of chicken with respect to election timing in minority circumstances was left unaffected by the fixed-date legislation. In this game, the Harper government beat the opposition to the punch on September 7, 2008, when they triggered a new election in response to Liberal leader Dion's earlier claim that the fixed-date legislation had given him the power to call the next election (Werner, 2008).

Harper's decision to instruct Governor General Jean to dissolve parliament and call an election for October 14, 2008, returned Canada to the traditional state of symmetrical instability which has characterized minority governments prior to fixed-date legislation (Knopff and Piersig, 2012: 6). In such a state of symmetrical instability, both the government and the opposition could precipitate an early election and destabilize parliament. The hope expressed by some that fixed election dates, though not legally binding, would help stabilize minority government by creating a convention of fixed election dates for the government and the opposition alike (Russell, 2008: 134-140) had been dashed.

The decision to break the fixed-date law arguably re-established the virtual right of dissolution for prime ministers, at least in minority-government circumstances. Both of the reforms we are considering are designed to counteract this virtual right of dissolution, but would they have done so in September, 2008 and altered Harper's manipulation of the fixed-date law loophole?

### *The New Zealand Protocol*

The New Zealand protocol would not have had a direct effect on the ability of Prime Minister Harper to achieve an early election. This is due to the protocol's restriction on the use of the prerogative power of dissolution only for prime ministers who do not clearly hold confidence. Recall that section 6.57 of the New Zealand Cabinet Manual explicitly states that the governor general will "act on the advice" of a prime minister who retains confidence to call an early election (Cabinet Office, 2008: 84). In October, 2008, the Canadian House of Commons had not withdrawn its confidence in the Harper government. True, the opposition was making plenty of noise about having the power to defeat the government non-constructively and trigger

new elections at a time of its choosing, something that the New Zealand protocol would have allowed. Since the timing was obviously *not* of its choosing, however, the opposition had to that point explicitly refused to defeat the government. Under these circumstances – i.e., circumstances of continuing confidence – there would be no reason under the New Zealand protocol for Governor General Jean to consider rejecting Harper’s dissolution advice. Essentially, Harper was in the same situation in 2008 as Helen Clark was in New Zealand in 2002, when she was granted the early election she desired. Hence, the New Zealand protocol would have done nothing to stabilize Canadian minority government in the actual circumstances of October 2008. It would allowed the government and the opposition to continue their game of chicken regarding who would be first to pull the plug and trigger new elections. It would, in short, have allowed Canada’s traditional conditions of symmetrical instability in minority government circumstances to continue.

It is also possible, however, that the protocol might have changed the circumstances and strategic calculations of 2008. Because the protocol clearly legitimizes mid-term transitions and encourages constructive voting, the opposition parties may have had an incentive to organize a viable governing coalition and to defeat and displace the government rather than to trigger new elections. In that case, the Governor General operating under the protocol would have had to select the alternative government rather than dissolve the House. In other words, the protocol might have encouraged the Liberal-NDP coalition that attempted “constructively” to unseat the Harper government after the 2008 election to emerge sooner than it did (Knopff and Piersig, 2012: 6). Without the protocol, such a constructive mid-term transition relatively late into a parliament’s term would not occur to Canadian MPs because of the widespread assumption that governmental transition without elections is appropriate only in the very early stages of a parliament’s first session (Forsey, 1968: 261-265; Russell, 2008: 22). By clearly changing that assumption and fully legitimizing mid-term transitions at any point, the New Zealand protocol would have changed the incentive structure for MPs during the months of partisan acrimony prior to Harper’s 2008 election call. As Russell has argued, the New Zealand protocol in combination with fixed election date legislation might induce parliamentarians to make the parliamentary term work without being constantly on the brink of dissolution (2008: 142; 150). Is it conceivable that Russell’s hope would have been fulfilled, that the opposition parties would

have beaten Harper to the punch by displacing him before he could advise an early election? The question is tantalizing, but any answer would be purely speculative.

### *Constructive Non-Confidence*

The effect of the constructive non-confidence reform package devised by Aucoin, Jarvis and Turnbull (2011) is less speculative. Under this proposal the discretionary power of dissolution is removed from the office of the governor general (and thus from the prime minister). As a corollary, the fixed-date legislation in this proposal becomes binding and can be circumvented only by two-thirds of the House supporting a motion for early dissolution (Aucoin et al, 2011: 219). Considering that Harper led a minority government in 2008, he did not control enough of the seats in the House to pass the two-thirds safety valve threshold set by Aucoin, Jarvis and Turnbull. If securing the early election he desired in 2008 on his own would have remained possible under the New Zealand protocol, it would clearly have been virtually impossible under the proposed constructive non-confidence requirement. To pass the two-thirds requirement, the Conservatives would have had to rely on backing from either the Liberals or from the Bloc Québécois and the NDP in order to reach the magic number of 204 needed to achieve dissolution<sup>32</sup> – an unlikely prospect. Nor could the opposition parties trigger an early election at a time of their partisan choosing, because they did not have enough seats amongst themselves to reach the two-thirds barrier.

Because it makes early elections so difficult, this constructive non-confidence proposal creates much stronger incentives for mid-term governmental transitions than does the New Zealand protocol. With the Aucoin, Jarvis and Turnbull (2011) proposal in place, the 2008 game of chicken between the government and the opposition about who gets to choose the timing of new elections for entirely partisan purposes would have been impossible. Instead, partisan calculations would have been turned more exclusively to the issue of whether and how the government might maintain confidence or whether, how (and by whom) it might be replaced within the existing parliament. It is always possible, of course, that parliament might eventually become so dysfunctional that a sufficiently multi-party consensus would emerge to achieve a

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<sup>32</sup> The Conservative government controlled 124 seats in the House of Commons compared to the opposition's 184 seats. The opposition divides up as follows: 103 Liberals, 51 Bloquistes, 29 NDP members, and one independent.

two-thirds vote in favour of early dissolution, but that would almost certainly be preceded by serious attempts at mid-term transition.

We have seen, of course, that votes of constructive non-confidence are not always serious alternatives to early dissolution. Indeed, in some systems of constructive non-confidence, the replacement of an incumbent government can sometimes be little more than an intermediate step to early dissolution. Recall that in Germany in 1982, the coalition that “constructively” replaced Schmidt with Kohl as chancellor, did so only because Kohl (having “confidence”) agreed to use Article 68 of the Basic Law to trigger an early dissolution (Southern, 1994: 30). The requirement of a two-thirds vote of MPs to achieve early dissolution seems less open to such manipulation. Constructively replacing one government by another based on a majority vote of less than two-thirds could not be an immediate stepping-stone to the two-thirds required for dissolution. And if two-thirds of MPs favoured early dissolution, they would have no need to first install a different government. An early-dissolution safety-valve requiring support of two-thirds of MPs thus seems particularly well suited to either sustaining confidence in the incumbent government or promoting serious attempts at mid-term governmental transition. What the New Zealand protocol encourages, the constructive non-confidence system promoted by Aucoin, Jarvis and Turnbull makes very difficult to avoid. Had this system been in place in 2008, the early dissolution of that year would have been much less likely than it would have been under the New Zealand protocol.

### **The 2008 Constitutional Crisis**

The “early” election of 2008 returned a second Conservative minority government. When the House was summoned for the Speech from the Throne on November 19, 2008, the government made its intentions clear: it would try to work with the opposition parties, especially in light of the looming economic storm clouds (Valpy, 2009: 8). Despite the rhetoric, the tone quickly changed with the government’s fall fiscal update. That the fiscal update was not well received is an understatement. It included a number of provisions that were condemned as overly ideological and partisan, such as cutting the parties’ per-vote subsidy and suspending the right of female federal employees to seek legal remedy on pay-equity issues, and critics alleged that it lacked any significant stimulus measure for the economy (Valpy, 2009: 9-10).



The opposition parties reacted by seizing the opportunity provided. The party elites quickly determined that they could find common ground to unseat and replace the government: on December 1, 2008 the opposition party leaders unveiled a formal accord which announced the Liberals' and NDP's intentions to form a coalition government that would govern with the support of the Bloc Québécois for all confidence matters until the end of June 2010 (Valpy, 2009: 12). Despite the Liberals and New Democrats together having fewer MPs than the Conservatives, the coalition would be able to control a legislative majority with the Bloc's support. The public declaration of a coalition agreement was intended to demonstrate that there was a viable governing alternative in the event that the Conservative government fell. This way, the opposition parties sought to assure Governor General Jean that if a non-confidence vote passed in the House of Commons she would not have to dissolve the Parliament but could call upon Dion to form a government.

The opposition parties planned to vote non-confidence in the government at the first opportunity, which was supposed to be Monday, 1 December. Monday had been designated as the Liberal's opposition day in the House of Commons, but the Conservatives used the government's power to postpone it to the following Monday (Valpy, 2009: 11). This gave the Conservatives time to launch a public relations campaign that framed the coalition as anti-democratic and a usurpation of power from the party that had "won" the election. Harper and the Conservatives maintained that the coalition could only legitimately take power after winning an election. Mid-term transitions seemed to be out of the question and Harper seemed willing in event of a loss of confidence to ask the Governor General to dissolve the House rather than allow the Liberal-NDP coalition take office.

This posed an interesting constitutional question: if the opposition parties could successfully launch and win a non-confidence motion would the Governor General appoint the coalition or sanction the dissolution of parliament? Unfortunately for the Liberal-NDP coalition, this question became moot. On Thursday, December 4, Prime Minister Harper went to Governor General Jean to request that she prorogue parliament until January 26, 2009 (Aucoin et al., 2011: 66). She granted the request and all activity in parliament came to an end. The crisis resolved itself when the coalition fell apart and the Liberals, now led by Michael Ignatieff, sustained the Conservative government's Speech from the Throne when the 40<sup>th</sup> Parliament resumed.

There are three parts to the 2008 constitutional crisis that need to be discussed here. First is the question of a mid-term change of government to the coalition. Second is the issue of an early election: given that the last election had been October 14, 2008, how early in the term can the House be dissolved? Lastly, there is the problem of prorogation. Commentators have accused the government of acting in bad faith by not allowing the House to express its desires through a non-confidence vote as the opposition clearly sought to do in early December. The following sections unpack how the two proposed reforms – the New Zealand protocol and constructive non-confidence – would have altered the course of the 2008 constitutional crisis and affected the possibilities of the coalition, early election, and prorogation.

### *The New Zealand Protocol*

The effect of the New Zealand protocol on the 2008 constitutional crisis is difficult to tease out. The first step is how it relates to the Liberal-NDP coalition. The New Zealand Cabinet Manual does not exhibit any preference regarding what type of government forms office. So long as the principles of democracy and responsible government are upheld, then single party or coalition minorities or majorities are perfectly acceptable options that provide the necessary ministerial advice for the crown (Cabinet Manual, 2008: 3). As for the specific sections of the Cabinet Manual that form the core of the New Zealand protocol, the ones on mid-term transitions actively encourage and recognize the legitimacy of coalition governments by recognizing that governments can change and confidence become unclear as new coalition arrangements and agreements are formulated (Cabinet Manual, 2008: 83).

Therefore, the New Zealand protocol would find that the Liberal-NDP coalition was a reasonable response to the outrage that the opposition felt to the Conservative government's fall fiscal update. Had the protocol been in place in Canada, the Conservatives would have been less able to attack the coalition for being undemocratic, unconstitutional, or illegitimate. The separatist flank might still have been a weak point for the coalition, but that is not relevant to the New Zealand protocol. It is up to the political process to determine what parties are acceptable coalition or supporting partners. Yet, it is important to note that the New Zealand protocol seeks to protect the political neutrality of the governor general and prefers appointing a willing alternative to dissolution, no matter what the partisan composition is. Accordingly, it is possible

that the argument condemning the coalition due to its separatist support would not have mattered significantly (Knopff and Piersig, 2012: 8).

In reaction to the coalition, there was the suggestion that if the coalition tried to take power, an election should be called instead. Had Harper advised the Governor General to dissolve the 40<sup>th</sup> Parliament early, it seems unlikely that she would have accepted the request. This is true whether or not the New Zealand protocol had been in place in Canada. But, the suggestion that there should have been an early dissolution raises an interesting question: how early in the parliamentary term can the request for an election be denied by the governor general?

The esteemed Eugene Forsey (1968) posits in his study of the royal power of dissolution that the governor general has the discretion to refuse a dissolution request when it is early in the life of a parliament so that its rights are not undermined. Dissolution should be denied to allow a newly summoned parliament to at least attempt to transact business, including electing a speaker and adopting the address in reply (to the speech from the throne). He suggests that parliament should at least try to finish its first session and complete the policy directives set out in the throne speech (Forsey, 1968: 261). To do so, parliament should make a serious attempt at passing the budget unless it can be demonstrated that doing so is impossible. A government thus could only be entitled to a very early dissolution if “(a) no alternative Government was possible, or (b) some great new issue public policy had arisen, or (c) there had been a major change in the political situation, or (d) the Opposition had explicitly invited or agreed to a dissolution” (Forsey, 1968: 262). Yet, Forsey still maintains that the governor general retains discretion, especially if supply has not been voted on (1968: 262).

Forsey distinguishes between dissolutions very early in the parliamentary term and those later on (1968: 266-267). Although the precise line between early and later is not readily apparent, the 2008 constitutional crisis certainly fell within Forsey’s “early” category. The previous election had been held on October 14, 2008, parliament had only been summoned for November 18, and it was in the process of debating a corrective mini-budget. Thus, the main events all unfolded within a month of the 40<sup>th</sup> Parliament being summoned.

The most likely outcome of a dissolution request would have been Governor General Jean’s refusal to use her reserve powers to such an end. Under the New Zealand protocol this would certainly also be the case since, unlike the Canadian tradition described by Forsey, the

New Zealand protocol does not distinguish between early and later dissolutions and mid-term transitions. Instead, any prime minister seeking dissolution must hold confidence and if he or she does not have it, then a majority of the House must support the use of the reserve power. The announcement of the coalition agreement on December 1, 2008 demonstrated that confidence was no longer clear and that the opposition parties were prepared to defeat the government. With such an announcement, a governor general operating under the New Zealand protocol could not simply have dissolved the House of Commons; to accede to dissolution would have undermined the people's elected representatives and responsible government. Accordingly, the governor general would have had an *obligation* to refuse granting an early dissolution request compared to the Canadian tradition that *presumes* the governor general ought to refuse the request (Knopff and Piersig, 2012: 8). True, an early dissolution might occur if there turned out to be no willing and able alternative government, but the dissolution would not occur on the say-so of the defeated prime minister,

The discussion of how the New Zealand protocol treats an early dissolution in light of a possible non-confidence vote leads into the problem of prorogation. Both dissolution and prorogation are reserve powers of the crown and while they have generally appeared to be virtual powers of the prime minister, under the New Zealand protocol, this virtual right is strictly limited to prime ministers with unquestioned support from the House. If confidence is unclear, the first duty of the prime minister is to determine where confidence lies (Cabinet Manual, 2008: 83). Therefore, as it was clear that confidence was in question, there is no doubt that Governor General Jean would have declined Harper's prorogation advice unless he could demonstrate that his government had regained confidence. The New Zealand protocol in Canada would have removed the possibility of prorogation as well as dissolution to protect responsible government and the ability of parliament to make and remove a government from office.

In sum, the New Zealand protocol would have successfully kept the House in session and denied prorogation. Any notion of early dissolution on just the prime minister's request would have been taken off the table, thus removing the threat of an election unless the opposition defeated the government without agreeing to form an alternative. If they did agree to a coalition alternative, it would have been appointed under the New Zealand protocol.

### *Constructive Non-Confidence*

Constructive non-confidence would have had many of the same effects as the New Zealand protocol – e.g., removing the prime minister’s ability to trigger early dissolution and prorogation – but, unlike the protocol, it would have required the kind of mid-term transition bid launched by the Liberals, NDP, and Bloc Québécois. Had the opposition parties managed to introduce a constructive non-confidence motion in early December, they would have succeeded in electing Dion as the next prime minister. The idea of coalition governments fits within the constructive non-confidence package and is a legitimate means for holding the government responsible and engineering a mid-term transition.

While the government may have had the ability to move the Liberal’s opposition day, they would have been unable to avoid it through either early dissolution or prorogation. The constitutional reform package proposed by Aucoin, Jarvis and Turnbull (2011) transfers decisions on dissolution and prorogation to the House, requiring in each case two-thirds support in the House of Commons for either to occur (unless the parliamentary term has expired, then dissolution and new elections are necessary). The argument made by the authors of *Democratizing the Constitution* is that to have a fully democratic regime that promotes responsible government, the governor general should not possess the reserve powers of dissolution and prorogation that have remained part of the crown in right of Canada. The reasoning is twofold: first, the governor general has proved ineffective at curtailing the power of the prime minister and second, those powers should rest with the people’s elected representatives in the House of Commons. This way, the House cannot be shut down at the government’s whim and instead is able to decide for itself whether it should be prorogued or dissolved (Aucoin et al., 2011: 203-204). So, the House has control over prorogation and dissolution regardless of whether or not the government has lost confidence.

In December, 2008, the Conservatives would not have had an option of dissolution or prorogation because they would have been unable to muster enough votes in the House of Commons. The Conservatives, with 143 seats, faced off against the 165 seat strong Liberal-NDP coalition with its support partner, the Bloc Québécois.<sup>33</sup> It is highly unlikely that the

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<sup>33</sup> Two-thirds of a House of Commons with 308 seats is 204. After the 2008 general election, the Conservatives had 143 seats, the Liberals had 77, the Bloc Québécois had 49 and the NDP had 37.

Conservatives would have been able to convince the Liberals or the Bloc and the NDP to break rank and vote with them.

Consequently, both the New Zealand protocol and constructive non-confidence would have succeeded in refuting the idea of an early election and ensuring that the House stayed in session rather than face prorogation and the clearing of the order sheet. Both reforms also encourage mid-term transitions at any point during the parliamentary term as the preferable option to an early election, though constructive non-confidence is much stronger in this regard because it requires constructive voting on non-confidence votes. With either of these reforms the constitutional crisis could have been avoided since the rules of the game would have been known. Part of the problem with the crisis was the lack of consensus on the constitutional conventions central to responsible government. This was not the case in the next event, the early dissolution in March, 2011.

### **March 25, 2011 Vote of Confidence and Early Dissolution**

On March 25, 2011, the Conservative government lost a non-confidence vote which censured it for being in contempt of parliament. Since the 40<sup>th</sup> Parliament had been summoned on November 18, 2008, this vote came late in the parliamentary term; under the traditional Canadian understanding it meant the crown's discretionary powers to refuse dissolution was weak or non-existent. Thus, when Prime Minister Harper requested that Governor General Johnston dissolve parliament, there was really no doubt that the advice would be followed. The House was dissolved on March 26 and an election was set for May 2, more than a year and half before the fixed election in October, 2012.

The early dissolution as a result of a successful non-confidence vote was similar to the non-confidence vote that had triggered the fall of the Martin government on November 28, 2005. In both cases there was no ambiguity about whether the vote was a confidence matter and because it was later in the term (and after the House had managed to vote on supply, etc.), there was an election call. However, unlike in 2005, the early dissolution in 2011 came after the enactment of fixed-date legislation. The non-confidence vote demonstrated the ability for the opposition to determine the next election in a minority government situation, thus underlining the

inherent instability of minority government regardless of fixed election dates. With the opposition parties uninterested in forming the kind of alternative government they proposed in 2008, there was no choice for the Governor General but to dissolve the parliament. Would the outcome have been different if either of the reforms had been in play?

### *The New Zealand Protocol*

Given the public's lack of enthusiasm for coalitions and mid-term transitions in 2008, the opposition parties had abandoned any idea of attempting another coalition and mid-term change of government. As a result, it was clear that there was no alternative government available for the Governor General to call upon and thus that the majority of the House were in favour of an early dissolution. As the New Zealand protocol requires a government that has lost confidence to operate under the caretaker convention, the prime minister must be able to demonstrate that he or she has consulted with other parties in the House and that a majority supports the decision to dissolve or prorogue the House (Cabinet Manual, 2008: 84). While Harper did not consult with the opposition parties prior to approaching Governor General Johnston, the opposition parties had made their preference for an early election public. Accordingly, had Canada been operating under the New Zealand protocol at the time, the House of Commons would still have been dissolved early and an election held on May 2, 2011.

But there is another point to be made here. Had the New Zealand protocol been adopted earlier and been widely accepted, then it is possible that the idea of a coalition government would not have been framed in such a negative light and the Liberals and NDP could have tried again to launch a mid-term transition with the Bloc Québécois' support. This is a significant "what if" scenario, but one that is worth mulling over. There is no doubt that under the New Zealand protocol, a Liberal-NDP coalition could have succeeded in forming government for the same reasons elaborated above regarding the 2008 constitutional crisis.

### *Constructive Non-Confidence*

In contrast to the New Zealand protocol, the presence of constructive non-confidence would most likely have ensured that the House continue to sit for the duration of its term, or at least not been dissolved early in March, 2011. The reason that this is not a definite answer is that

had the Conservatives decided that they too wanted an early election, then the parties could have all joined together to surpass the two-thirds safety-valve threshold for an early dissolution. Without such help from the Conservatives, the opposition parties could not, under the rules of constructive non-confidence, have achieved the early election they desired in 2011. They might still have introduced a resolution that condemned the government to express their discontent, but this would not have counted as a non-confidence vote. They could formally withdraw confidence only if they were willing to form an alternative government.

As indicated above, the opposition under constructive non-confidence could also have introduced a motion to dissolve the House and hope that the Conservatives would be willing to vote for dissolution too, a highly unlikely outcome unless the Conservatives foresaw the majority that they received in May, 2011 (Knopff and Piersig, 2012: 9). But a multi-party agreement to dissolve parliament does not carry the same political weight as the opposition condemning the government in a negative confidence vote for blatantly trying to undermine it and responsible government. The latter way of rhetorically framing an early dissolution has obvious advantages for the opposition, but is not available to them under constructive non-confidence. Not only is the alternative multi-party agreement generally unlikely, but it is rhetorically weaker for the opposition. Overall, the rules and the incentive structure of constructive non-confidence strongly discourage the kind of early dissolution that occurred in Canada in 2011.

The question of what might have happened in 2011 if either of our two reforms had been in place shows that an early dissolution probably would not have happened under constructive non-confidence but likely would have happened if the New Zealand protocol were in effect.

As for a mid-term transition at this relatively late point in the parliamentary term, it could have happened under the New Zealand protocol and would have been required with a constructive non-confidence vote. Theoretically this was certainly possible. After all, with the Bloc Québécois' support the Liberal-NDP coalition had the votes necessary to pass the motion and maintain power until the next scheduled election in October, 2012 (Knopff and Piersig, 2012: 9). In fact, one might question the practicality of a coalition alternative so late in the parliamentary game under either reform. If the opposition parties were inclined to a coalition alternative at all, it seems more likely, under both reforms, that they would have seriously considered that option much earlier on.



## Conclusion

Having counter-factually replayed the four political controversies, what can be concluded about the possible impact of the two reforms? How effectively might they have stabilized minority government in Canada if they had been in place? The table below provides a summary of the change or lack of change that the two reforms would have had on the May, 2005 non-confidence vote, the early dissolution of September, 2008, the 2008 constitutional crisis, and the March, 2011 non-confidence vote and early dissolution.

**Table 5: Impact of the Reforms on the Four Controversies**

	<b>The New Zealand Protocol</b>	<b>Constructive Non-Confidence</b>
May 10-19, 2005: Non-Confidence Vote	No change: Brinkmanship remains	Change: No confidence vote possible
September 7, 2008: Early Dissolution	No change: Early dissolution occurs	Change: No early dissolution
December, 2008: Constitutional Crisis	Change: Mid-term transition, Liberal-NDP coalition government	
March 25-26, 2011: Non-Confidence Vote and Dissolution	No Change: Early dissolution likely	Change: No early dissolution
<b>Was Stability Enhanced?</b>	<b>3 of 4 events proceed without change. Parliamentary term stabilized in 1 of 4 controversies.</b>	<b>3 of 4 events avoided, 1 altered. Parliamentary term stabilized; no early elections.</b>

Of the two reforms, constructive non-confidence is more successful at stabilizing minority government in Canada for it would have changed the outcome in all four of the controversies and ensured that none of the parliamentary terms were ended prematurely by early dissolutions. The presence of constructive non-confidence and its ability to keep parliament in session would improve the success of the fixed-date legislation and make it generally effective in minority government circumstances. Constructive non-confidence's requirement of instituting an

alternative government would have ensured the success of the 2008 coalition. It would have had no effect in 2005, and given the lack of interest in forming a coalition, it was unlikely in 2011.

As for the New Zealand protocol, its ability to enhance parliamentary stability in the context of these minority government situations is weaker. It is quite possible that three of the four controversies would have occurred without any change had the reform been in place. That is, the two early dissolutions that occurred during the 2006-2011 period would likely have unfolded in much the same way if the protocol were in place. The only significant impact would have been felt during the constitutional crisis of December, 2008 when, like constructive non-confidence, the New Zealand protocol would have resulted in a mid-term transition and the appointment of Dion as prime minister with a Liberal-NDP coalition cabinet. The fact that both reforms prefer mid-term transitions over early dissolutions means that the necessary actions of Governor General Jean would have been easily discernible to the politicians and pundits, providing fewer opportunities for political gamesmanship.

The stabilizing effect of constructive non-confidence for hung parliaments and minority governments makes it the preferable reform for Canada if the goal is to ensure that parliament sits its full term and remains in session as much as possible. That constructive voting on confidence measures is required and not simply encouraged, as is the case with the New Zealand protocol, makes the reform far stronger at tackling partisan brinkmanship and games of political chicken. However, increased parliamentary stability is not the only consequence of constructive non-confidence, and some of the others may be less desirable. The next chapter takes a broader and deeper look at the comparative advantages and disadvantages of the two reforms.

## **CHAPTER 5: WHICH REFORM IS THE BEST FIT FOR CANADA?**

Constructive non-confidence and the New Zealand confidence protocol each promise to deliver reform to Canada's crumbling consensus on the confidence convention. Having examined how the reforms have worked abroad and how they may have worked in Canada, this chapter asks which of the two proposals is a better fit for Canada. To answer this question, we need to assess, first, which of the two proposals has the better prospect of being achieved in Canada, and second, which is the most desirable in the Canadian context. I maintain that the New Zealand confidence protocol comes out ahead of constructive non-confidence on both counts: it does not require constitutional amendments and more realistically fits within Canada's system of responsible government. Constructive non-confidence is much harder – indeed, virtually impossible – to achieve in Canada due to the stringent constitutional amendment formula required and it has tended to emerge in countries that have experienced critical parliamentary junctures rather than developing organically. Not only is achievability low, moreover, so too is constructive non-confidence's desirability. As we shall see, constructive non-confidence actually undermines some of the goals that its proponents hoped it would achieve in Canada.

### **Prospects for Reform**

The literature of “historical institutionalism” can help us think about the different prospects of implementing the New Zealand protocol or constructive non-confidence in Canada. Historical institutionalism assumes that institutions are generally at equilibrium for most of their existence, which ensures that decisions taken at their creation continue to perpetuate themselves (Peters, 2005: 77). This stability is known as path dependency, and the fact that institutions are predominately at equilibrium allows us to make reliable observations about institutional arrangements in order to explain policy outcomes (Steinmo, 1992: 15). Stability does not rule out change and historical institutionalism proposes a dynamic model where institutions are the independent variable during times of stasis but when institutions break down or face major ideational change they become the dependent variable (Thelen and Steinmo, 1992: 16-17). The most dramatic shifts in institutional path dependency changes occur in the face of an exogenous

shock (Peters, 2005: 77). According to Stephen Krasner (1984), exogenous shocks, for instance military actions or major socioeconomic developments, create crises that punctuate an institution's equilibrium and force relatively abrupt institutional change, which is quickly followed by a return to institutional stasis (cited in Thelen and Steinmo, 1992: 15). Depending on the power of the punctuated equilibrium, also called a critical juncture, it could lead to the collapse of an institution and its replacement by another. However, punctuating an institution's equilibrium does not necessitate its collapse and an institution could continue with a modified set of rules. Historical institutionalism also conceives of a central role for "ideas" in institutional change because new ideas can drive the evolution and adaptation of the set of rules that make up an institution. Thus, institutions, ideas, and the environment or historical context are in a co-evolutionary process that ensures constant political evolution (Steinmo, 2008: 130).

Both New Zealand and the constructive non-confidence regimes hit critical junctures that instigated reform of their confidence rules. In New Zealand, the adoption of MMP in 1993 created an exogenous shock to the Cabinet Manual that led to the first expression of the New Zealand confidence protocol in the 1996 edition of the Manual. In the case of constructive non-confidence, various critical junctures led to its creation in Germany and its subsequent adoption in other countries. For the purpose of this chapter, the focus is on Germany and Spain, which have used constructive non-confidence the longest and which both turned to the reform when rebuilding their parliamentary democracies after the fall of their fascist dictatorships.<sup>34</sup>

### *The New Zealand Confidence Protocol*

New Zealand's 1993 adoption of MMP – the development that in turn generated the New Zealand confidence protocol – illustrates one of the key concepts of historical institutionalism.

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<sup>34</sup> Of the six countries overviewed in Chapter Three, Germany and Spain are the best two countries for comparison here based on most-similar case selection. Both are federal and bicameral states with strong regional parties. Spain also shares the majoritarianism that is traditional to Westminster parliamentary systems like Canada because its electoral system, although classified as proportional, over-rewards the winning party (Lijphart et al., 1988: 13). In contrast, Germany is a consensus-based democracy where power tends to be shared or dispersed throughout the political system (Lijphart, 1994: 2). Of the two countries, Germany has had a successful constructive non-confidence vote whereas Spain has not. The other four countries have adopted constructive non-confidence much more recently as part of their post-communist traditions or, in the case of Belgium, to inject some much needed stability. Although Belgium is similar to Canada in terms of its biculturalism, it is its own unique case and its instability is primarily due to the trouble with government formation and governments falling apart from within rather than non-confidence votes (Deschouwer, 2009; De Winter, 1998).

Electoral systems, once established, are notoriously difficult to reform because the governing party called upon to change the system has, by definition, benefitted from the status quo. Electoral systems, in other words, are institutionally sticky in precisely the path-dependent ways emphasized by historical institutionalism. But as the transformation of New Zealand's electoral system shows, a new "critical juncture" can destabilize an existing equilibrium to generate substantial institutional change.

Until 1993, New Zealand had the same single member plurality (SMP) electoral system that is familiar to Canadians. SMP systems notoriously over-reward some parties with a greater share of the seats in the legislature than their share of the popular vote and under-reward others. One consequence of this is so-called "false majority" governments, which gain a majority of seats on the basis of a minority of votes (Russell, 2008: 5), a phenomenon that encourages – though it obviously does not guarantee – majority governments.<sup>35</sup> In New Zealand, as more parties entered the party system, SMP produced distortions that went beyond "false majorities." For example, in the elections of 1978 and 1981, the winning party failed even to win a plurality of the popular vote. Dissatisfaction with such electoral outcomes created the critical juncture needed for reform.

Reform did not come immediately, however. The process began when the Labour government appointed a royal commission in 1984 to examine electoral reform. The commission recommended MMP for New Zealand but cited the need for a referendum. As is the case in Canada today, the political elites in New Zealand did not favour reform – the Prime Minister and the Leader of the Opposition both stated publicly that they were opposed to MMP (Seidle, 2002: 13). Clearly, New Zealand's proponents of electoral reform were fighting precisely the kind of uphill battle for institutional change emphasized by historical institutionalism.

Nonetheless, those desiring electoral reform in New Zealand were able to launch a targeted campaign through the Electoral Reform Coalition (ERC). The ERC was able to tap into New Zealand's political culture and trigger the kind of ideational shift that, according to historical institutionalism, can lead to significant institutional change. In particular, the ERC brought together those who thought that "fairness" was an important New Zealand value that

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<sup>35</sup> In New Zealand, the tendency of SMP to produce majority governments was so pronounced that there were only four hung parliaments between 1890 and 1996, which was the first MMP election.

SMP did not represent. As well, New Zealanders seemed to be tiring of the strong majoritarianism that had existed in the country and blamed SMP for fostering three-year “elected dictatorships.” The promised referendum was finally held in 1992 to determine the alternative system to be proposed against SMP in a second and binding referendum in 1993. In this second referendum, 54 percent of voters endorsed MMP, thus setting the stage for new electoral legislation (Seidle, 2002: 13-14).

This change of the electoral system had major effects on the broader parliamentary system and the constitutional structure of the country. In particular, the turn to MMP moved New Zealand politics away from the majoritarianism typical of Westminster-style democracy to a more consensus-based – or negotiation-oriented – style of democracy (Lijphart, 2012: 26). Certainly MMP created a very different political environment by significantly reducing the likelihood of majority governments. Instead, the switch to MMP made either minority or coalition governments the norm, which altered the incentive structure for New Zealand’s political parties. Because it no longer made sense to force an early election in hope of escaping the wastelands of a hung parliament for the greener grass of majority government, parties embraced inter-party negotiations and confidence agreements if not outright coalitions (Palmer and Palmer, 2004: 17). This MMP-generated transformation was itself the “critical juncture” that gave rise to the New Zealand protocol in the Cabinet Manual’s 1996 edition and its default understanding of non-confidence votes as leading to mid-term transitions rather than new elections.

At the same time, the constitution’s stickiness, or its path dependency, was not completely disrupted by New Zealand’s change of electoral system. No major constitutional transformation of the kind that generated constructive non-confidence in Germany or Spain occurred. Rather, New Zealand’s new confidence protocol took the form of flexible evolutionary adjustments to the conventions of responsible government as expressed in the New Zealand Cabinet Manual. To ensure that these conventions and the confidence protocol were clear, the Cabinet Manual was publicly released prior to the first MMP election in 1996.

### *Constructive Non-Confidence*

The German and Spanish adoption of rules *requiring* constructive non-confidence votes as opposed to merely *encouraging* them in the New Zealand manner was much less evolutionary. It was a more significant constitutional transformation, prompted by a more dramatic kind of critical juncture. Although New Zealand's dissatisfaction with SMP was obviously strong enough to trigger electoral change, which then adjusted the rules of non-confidence, it was nothing like the more generalized sense of parliamentary crisis that led to new constitutional arrangements in Germany and Spain.

The origins of constructive non-confidence lie in the failures of the Weimar regime. As the 1920s progressed, the highly fragmented parliaments of the Weimar Republic could not provide sufficient confidence to maintain any cabinet in office for the full parliamentary term (see Chapter Three). There was a high degree of responsiveness from the government to the legislature, but to the point of being harmful to parliamentary democracy. While responsible government requires the government to be responsible to the legislature, the opposition parties must be responsible too and not seek to undermine the regime. The opposition exists to hold the government to account to improve governance and to provide an alternative government if needed within the existing regime (Smith, 2013: 6). This is why in Canada the opposition is termed "Her Majesty's Loyal Opposition." But this was not the case during the Weimar Republic where the extreme left and right parties both sought to exploit their positions in parliament to overturn the constitution. It was the Nazis who eventually succeeded in overturning the young democracy, severely puncturing the parliamentary equilibrium.

The German case shows that changing the path dependency of parliamentary democracy to incorporate constructive non-confidence required a major shock to the system. It took the collapse of the regime for the German political leaders to re-think the confidence convention. The ease with which the Weimar constitution had been overturned caused German disillusionment with the traditional Westminster model of negative confidence votes and created the critical juncture needed to develop a constructive non-confidence requirement that forced the opposition to act "responsibly" when removing a government from office by assuming office itself. The Spanish politicians drafting the post-Franco constitution copied the German constructive non-confidence model in response to the same kind of fascist threat to parliamentary

democracy (Thiel, 2009; Prado, 2009). In both countries, constitutional drafters felt that the new resignation rule would provide parliamentary democracy with the necessary tools to defend itself against anti-regime forces.

The more intense critical juncture of regime collapse in Germany and Spain has, as we have seen, resulted in a greater change to the practice of confidence compared to New Zealand. But as the change to the confidence convention becomes more radical, how does that affect its achievability in Canada? Constructive non-confidence is a significant shift away from the current negative non-confidence vote and even from the New Zealand confidence protocol, both of which operate under constitutional conventions rather than the formal, legally binding constitution. Entrenching the confidence convention – as European-style constructive non-confidence requires in Canada – fundamentally alters the dynamic in parliament and (as we shall see) often makes it more difficult to remove the incumbent government.

*Canada: Has a Critical Juncture been hit?*

Has Canada experienced the kind of critical juncture that could generate either an evolutionary New Zealand-style confidence protocol or a more revolutionary European-style constructive non-confidence requirement? To begin, it is worth noting that the kind of electoral reform that led to the New Zealand protocol, and that initially made that protocol attractive to Aucoin and Turnbull (2004), has not occurred in Canada. While various Canadian jurisdictions were considering the adoption of more proportional systems at the time that Aucoin and Turnbull first wrote about reforming our confidence conventions, electoral-system path dependence and institutional stickiness proved more robust in Canada than in New Zealand; none of the proposed electoral reforms succeeded.

But electoral reform is not the only kind of disruption that might prompt reform of Canada's confidence conventions. For Aucoin, Jarvis and Turnbull (2011), the recent minority government period revealed a crisis of understanding about the confidence conventions that was of sufficient intensity to justify, and indeed require, reform. Indeed, considering the crisis substantial enough to justify more than their originally favoured New Zealand-style protocol, they called instead for the more dramatic remedy of European-style constructive non-confidence (Aucoin et al., 2011: 208-209).



But one can surely question whether Canada has experienced a regime crisis of the kind that generated constructive non-confidence in Germany and Spain. Those democracies fell apart from the inside and were replaced by totalitarian regimes. In Germany, the Weimar constitution was toppled from within by parties seeking a diet of dissolutions to increase instability and by a head of state who abandoned his office of political neutrality and failed to protect the state (Golay, 1958: 122-126). In Canada, by contrast, the recent parliamentary instability has been driven by the political interests of parties that (except for the Bloc Québécois) all want to form the next democratically elected majority government.

In fact, there has been no regime crisis in Canada comparable to those in Germany and Spain. The closest to a constitutional critical juncture of this kind that Canada has experienced was the 1980 and 1995 referendums when Quebec voted on separating from Canada. The 1980 referendum produced an existential crisis that did result in major institutional change, namely, the Constitution Act, 1982, which, among other things, “patriated” the Constitution by adopting a series of entirely domestic formulae for further constitutional amendments. These significant constitutional changes did not touch our confidence conventions, however, except by making them very difficult to change through explicit constitutional amendment. As previously discussed, the kind of constructive non-confidence recommended by Aucoin, Jarvis and Turnbull (2011) entails removing the discretionary reserve power of the governor general to call elections at any time, something that under section 41 of the Constitution Act 1982 requires the unanimous support of the federal parliament and the legislative assemblies of all 10 provinces (Canada, 2014). So long as an amendment of the resignation rule does not mention or affect the crown and its reserve powers, it could perhaps be entrenched using section 44 of the Constitution Act, 1982, which allows parliament to “exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons” (Canada, 2014).<sup>36</sup> However, once changes to the powers of the crown and the governor general enter the picture, as they clearly do under the Aucoin proposal, section 41’s unanimity requirement comes into play. It would indeed require a major sense of crisis to enact the kind of constitutional amendments required to establish constructive non-confidence requirements in Canada.

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<sup>36</sup> Section 44 has been used three times to amend the constitution. In 1985 and 2011, the section 44 amending formula was used to change the formula for apportioning seats in the House of Commons (Reesor, 1992: 400; Canada, 2011b) while 1998 it was used to give Nunavut representation in the Senate (Canada, 1998).

Without a major crisis, it seems extremely unlikely that the barrier set by section 41 could be breached. First, unanimity in Canadian politics is rare, so from the very start it seems unlikely that all Canadian legislatures would pass the amendment. Second, the amendment to transfer the reserve powers away from the crown reduces the power of the prime minister, who would have to give up the ability to advise the governor general to use the reserve powers. Since that is not in his or her interest, it is improbable that a prime minister would choose to do so without some extremely significant push. And without the prime minister's backing, it would be very difficult to get the amendment through all of the legislatures: i.e., it would be tough to find the majorities in the federal parliamentary chambers, and the prime minister's leadership would probably be vital in convincing the provincial legislatures to pass the amendment.

Aucoin, Jarvis and Turnbull are certainly aware of the difficulties, but they appear to believe that the events between 2004 and 2011 created the kind of regime crisis that could plausibly generate constitutional amendments establishing constructive non-confidence requirements. It is questionable, however, that these events, individually or collectively, amount to the requisite crisis. The constitutional crisis of 2008 perhaps came the closest as it involved using the reserve power of prorogation to forestall an imminent non-confidence vote, but ultimately it did not overthrow democracy in Canada. While it may have set a dangerous precedent (Heard, 2009; Cameron, 2009; Weinrib, 2009), the House of Commons was given a new chance to withdraw confidence in January, 2009.

Certainly, the call for constructive non-confidence issued by Aucoin, Jarvis and Turnbull in 2011 has not been taken up with any vigour. In part, that may be due to the return to majority government in 2011. Because majority governments are considered the norm in Canadian politics, this has removed the urgency from reform to the confidence convention. Although there may be future constitutional crises, at the moment the government is highly unlikely to face any threats to its confidence and can retain office for the full parliamentary term.

The historical institutionalist perspective of the importance of critical junctures in adopting constructive non-confidence is further emphasized by returning to the militant democracy principle. The principle, based on the Weimar Republic's experiences as noted in Chapter Three, does not trust protection of the regime to a neutral head of state (Golay, 1958: 122-126), such as the Queen and her representatives, as is the case in Canada. It shifts the onus

to the constitution and the courts, believing them to be harder to manipulate, and gives the justice system the capacity to prosecute individuals accused of undermining the constitutional order. Constructive non-confidence is part of the militant democratization of the German Basic Law because it protects the executive against parliamentary instability, and it has to be balanced by the removal of the reserve powers from the head of state or else it fails to deliver the fullest degree of stability. For example, the reserve power of dismissal was removed so that heads of governments can only be removed through constitutionally prescribed confidence votes – which in the case of Germany are constructive non-confidence and the Article 68 confidence vote. Aucoin, Jarvis and Turnbull (2011) seek to adopt a similar set of reforms in Canada (minus an Article 68 confidence vote) that transfer dissolution and prorogation to a supermajority of the House of Commons. And yet, they do not make these recommendations based on militant democracy and the protection of the constitution against anti-system parties – instead their reform package is only intended to protect against politicians acting in bad faith and manipulating the constitution for their own benefit. This does not seem like the kind of critical juncture that can produce constitutional amendments under the section 41 unanimity formula and institute constructive non-confidence requirements.

But perhaps it is enough to lead to adoption of a New Zealand-style confidence protocol in Canada. Certainly, the New Zealand confidence protocol is more realistic because it targets the constitutional conventions effectively and is relatively easy to achieve – according to Russell, the protocol is simply “an evolution of our version of the Westminster model” (2008: 150). If implemented in Canada, the New Zealand protocol would retain much of our flexibility regarding the constitutional conventions of responsible government by clarifying conventions without codifying them (or amending the Constitution as constructive non-confidence would require) and binding responsible government to the point of limiting the responsiveness of the system.

Adopting the New Zealand protocol in Canada does not demand any significant constitutional changes. The reserve powers remain the purview of the crown and are accessible to the prime minister under clear circumstances. Parliament retains its traditional power to remove the incumbent government from office and replace it with a new government if there is sufficient support. The New Zealand confidence protocol reasserts the legitimacy of mid-term

transitions and encourages parliament to sit its full term but does not demand a full term. Arguably, bringing the New Zealand protocol to Canada would signify no more than reaffirming a traditional view of mid-term governmental transitions as democratically legitimate even if the new governing coalition does not include the party with the largest number of seats.

### **The Desirability of the Reforms in Canada**

Assuming reform of Canada's confidence convention is needed, the New Zealand protocol is not only the more feasible choice, but also the more desirable choice. While Aucoin, Jarvis and Turnbull admit that there is some difficulty in achieving their constructive non-confidence reform package, they consider it better in principle. They see the New Zealand protocol as a second-best alternative, better than no reform at all if constructive non-confidence proves to be impossible, but certainly not their first choice (Aucoin et al., 2011: 226-227). I take the opposite view. At the most basic level, the New Zealand protocol is a more desirable fit for Canada for the same reason that it is more achievable: as part of an authoritative text on responsible government, it describes the constitutional conventions but keeps them as flexible conventions without turning them into law. As such it is an organic development, a natural fit with our Westminster-style parliamentary system, one that makes modest but not wholly transformative changes.

Constructive non-confidence, by contrast, has the potential to dramatically alter Canadian political institutions in unexpected ways. Introducing it could serve as the exogenous shock that shifts the historical trajectory of a number of institutions, including the office of the prime minister, party leaders, and the House of Commons. Aucoin, Jarvis and Turnbull (2011) posit that their constitutional reform package will have three interrelated positive effects: 1) it will foster parliamentary stability by eliminating the threat of early elections; 2) it will legitimize mid-term transitions to replace governments that have lost confidence; and 3) it will reduce executive domination by empowering the House of Commons vis-à-vis the executive. In fact, a close examination of the actual experience of constructive non-confidence in Europe suggests that only one of the aims is likely to be achieved. While constructive non-confidence may indeed stabilize parliamentary terms, it seems likely to exacerbate executive dominance rather than ameliorate it. With respect to this issue, Canadian proponents of constructive non-confidence

tend to forget that Germany originally designed the system not to stabilize parliaments but to enhance executive stability. Moreover, the European evidence raises serious questions about the capacity of constructive non-confidence to legitimate genuine mid-term governmental transitions without new elections. Canadian proponents have not paid enough attention to how rare mid-term transitions of government are in constructive non-confidence regimes and to the practice of legitimating them through “early” elections. Let us consider in turn each of the three benefits Aucoin, Turnbull, and Jarvis hope constructive non-confidence will deliver to Canadians.

### *Constructive Non-Confidence and Parliamentary Instability*

The constructive non-confidence package is believed to enhance parliamentary stability because the fixed parliamentary term and clear non-confidence rules combats the brinkmanship that has poisoned opposition-government relations in Canada. No longer would it be possible for the government to threaten an early election if defeated on legislation<sup>37</sup> nor could the opposition threaten to vote down legislation in hope of triggering an election.

On this issue, the European evidence does indeed support Aucoin, Turnbull, and Jarvis. The constructive vote of non-confidence is without a doubt a better guarantee of stability than other types of non-confidence votes covered in Chapter Three. De Winter finds that, between 1945 and 1990, governments in countries with negative rules are more than twice as likely to be defeated on a confidence motion due to a loss of support as in countries with either constructive or absolute majority rules (1995: 140).<sup>38</sup> De Winter’s analysis combines constructive and absolute resignation rules into one “positive measure,” since both place more stringent requirements on the opposition parties, but if we single out the constructive rule: his data show that 6.45% of governments fell early under constructive non-confidence compared to 18.35% of governments removed by negative non-confidence votes. This is an even higher rate of stability

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<sup>37</sup> It is worth noting that the constructive non-confidence package proposed in *Democratizing the Constitution* makes the confidence relationship between the House of Commons and the government asymmetrical because only those seeking to remove the prime minister can initiate a test of confidence (Aucoin et al., 2011: 219). It abolishes the ability for the government to ask the House of a vote of confidence, an option that remains in the German and Spanish constitutions, because of the concern that the government can use such a vote in “bad faith” as the German government did in 1972, 1982, and 2005 to engineer an early election. Such asymmetry is a unique constitutional arrangement compared to all of the current European constructive non-confidence regimes.

<sup>38</sup> De Winter’s 1945-1990 data comes from seventeen European democracies. These are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom (De Winter, 1995: 138).

than the broader category of positive resignation rules. There is little doubt, then, that constructive non-confidence does enhance stability during hung parliaments (De Winter, 1995; Bergman et al, 2003).

Germany illustrates and confirms the pattern found by De Winter (1995): of the sixteen parliamentary terms since 1949, Germany has only experienced three early dissolutions despite the fact that all but one of the country's elections has resulted in a hung parliament.<sup>39</sup> Diermeier, Eraslan and Merlo's counterfactual analysis finds that if Germany had not included constructive non-confidence in its 1949 constitution, there would have been a 12 percent reduction in the average length of the parliamentary term/government duration from approximately 727 days to 637 days (2002: 903). Spain has had a less successful track record because its constructive non-confidence package accords the prime minister the right to ask the King for an early election (Bergman et al., 2003: 164). Thus, out of ten parliamentary terms in Spain, six have been dissolved early with one of those early dissolutions due to a loss of confidence on the budget and another due to an agreement that an election after the ratification of the 1978 constitution was needed. It is also important to note that three of those ten terms had single-party majority governments (1982, 1986, and 2004). Still, between 1979 and 2005, Spain had the highest level of stability in Europe with the average term being 42 months (Gunther et al., 2005: 117). So, for a total of 40 Spanish and German governments operating under a constructive non-confidence regime, only 10 percent fell because they lost the confidence of the lower chamber.

In sum, Aucoin, Turnbull, and Jarvis can indeed find support in the European evidence for their claim that constructive non-confidence will increase the stability of parliamentary terms. The evidence for their other two claims – that mid-term governmental transitions will become more democratically legitimate, and that executive dominance will decline – is not as strong. Indeed, in Europe increased parliamentary stability seems actually to have eroded the democratic legitimacy of mid-term government transitions and enhanced executive power.

### *The Legitimacy of Mid-Term Government Transitions*

In principle, responsible government allows for mid-term transitions so that the people's representatives can hold the incumbent government accountable and create a new one when

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<sup>39</sup> In 1957, the sister parties of the CDU and CSU took a majority of the seats in the Bundestag.

warranted. But the fact that mid-term transitions have been so infrequent in Canada has helped undermine their democratic legitimacy. Most Canadians believe that they cast their ballots primarily for the next prime minister and governing party rather than the local candidate and they expect the “elected” government to be displaced only by new elections (Franks, 2009: 39). Blais et al. find that local candidates matter less than parties and leaders: only 5 percent of voters in the 2000 election based their vote on their local candidates (2003: 663). Polling also shows that a majority of Canadians think the prime minister is directly elected (Russell, 2009a: 207).<sup>40</sup> According to this logic, mid-term transitions are not democratically legitimate and the confidence convention should evolve so that a loss of confidence always results in an early election. This populist modification ensures that the people can determine who will be designated as the next prime minister, not parliament.

Constructive non-confidence is supposed to reverse this trend by insisting that the consequence of a non-confidence vote is a government transition without new elections. However, the reality on the ground in European constructive non-confidence regimes is somewhat different. In practice, mid-term transitions have been almost as rare in Germany and Spain as they are in Canada, and the democratic legitimacy of such transitions seems just as questionable. Of the two countries, only Germany has had a successful mid-term change of government and a careful examination of this case highlights the difference between the formal constitution and how it operates in practice.

The experience of the successful vote of constructive non-confidence on October 1, 1982 suggests that when mid-term transitions do occur, the new government must seek an early dissolution to gain full democratic legitimacy. In 1982, the CDU-CSU successfully managed to convince the FDP that they would be better off leaving their coalition with Chancellor Helmut Schmidt and the SPD<sup>41</sup> and forming a new coalition government under the leadership of the CDU’s Helmut Kohl (Southern, 1994: 29). Notwithstanding the show of support needed to win the constructive vote of confidence, Kohl’s government did not last long. In the course of the

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<sup>40</sup> One example is a December, 2008 Ipsos Reid poll that showed 51 percent believed the prime minister to be directly elected. This is striking because this was just after the heat of the 2008 constitutional crisis where the inner workings of responsible government were exposed through extensive media coverage and public debate.

<sup>41</sup> There were a number of reasons that brought about this decision and it must only be noted that the FDP had been drifting apart from the SPD on various policy positions and because Schmidt did not have as firm a grip on his party as he had in the 1970s (Padgett, 1994: 64-67).

ensuing constitutional debate, Kohl argued that his government was only temporary: it would deal with the pressing economic and financial problems until an election would be called for the following spring (Irving and Paterson, 1983: 417). New elections were indeed sought within several months through the use of a government-led, contrived loss of confidence under Article 68 and, even though the confidence vote violated the spirit of the Basic Law, new elections were held on March 6, 1983.

After the Article 68 vote of confidence was lost, President Carstens consulted the government and opposition party leaders. He found that all of the parties – even the SPD – supported an election and so agreed to Kohl’s dissolution request (Rudzio, 2000: 57; Kommers, 1989: 125). President Carstens went on to elaborate his reasoning publicly on January 7, 1983, stating that the circumstances of the loss of confidence were secondary to the fact that Kohl had lost the Bundestag’s confidence (Southern, 1994: 30). Secondly, the President revealed that the FDP, as a condition for its support in the constructive non-confidence vote, expected that the mid-term transition would be followed by new elections. Accordingly, Kohl did not in fact have a true majority but was chancellor “subject to a proviso” (Southern, 1994: 30).

Not only was Article 68 used in 1982 to contrive an early dissolution, there is strong evidence that the people considered electoral approval to be necessary (Southern, 1994: 30). Opinion surveys conducted in the 1980s indicated a growing alienation between traditional party elites and the majority of voters who desired to have a say regarding elite decisions. This became clear during the 1982 events as polls showed that a majority of Germans felt any change of government should be accompanied by new elections (Pridham, 1983: 25). For example, a survey of 1,622 voters interviewed between 18 and 25 November 1982 found that two thirds of respondents were dissatisfied with the way that the government had changed hands and 58 percent thought that the FDP had committed treason by switching its support as it had campaigned for continuing the social-liberal coalition (Kaase, 1983: 159). German voters had come to expect parties to publicly indicate what their coalition preferences are before the election day, giving German democracy a plebiscitary element that undermines the constitution’s parliamentary-representative principles (Kaase, 1983: 165). As for the FDP, its decision, nicknamed the “flying change,” alienated many of its supporters and over October and November, its membership fell by 6,000 (Pridham, 1983: 29).



Over the last few decades, federal elections in Germany have come to be seen as a *Kanzlerwahl* or “chancellor election” (Southern, 1994: 27). This is because parties have traditionally declared their coalition agreements prior to election day, thereby often creating two clear rival groups. As such, “all that the president and parliament have had to do in those circumstances is to ratify the decision of the electorate” (Southern, 1994: 27). After the election and the investiture vote, the chancellor is the most important figure of the government and his or her personal image as communicated through the media is an important factor in the success of the government (Niclauss, 2000: 77). If the chancellor is able to maintain high personal ratings, then he or she is able to gain significant clout to balance against pressures exerted on him or her by either the party or by the coalition partner (Padgett, 1994: 63).

These opinions were drawn upon by the Constitutional Court in the *Bundestag Dissolution Case*, which was handed down on February 16, 1983.<sup>42</sup> The Court decided 6-2 against the position that premature dissolution was unconstitutional and should be overturned (Irving and Paterson, 1983: 418). It refused to nullify the President’s decision to act on the Chancellor’s advice and dissolve the Bundestag because it determined that it had to take at face value the good faith of both men’s actions as well as the Bundestag which had indicated its loss of confidence (Roberts, 2009: 222). That did not stop the Court from disapproving of the executive’s use of Article 68 which had been clearly used to circumvent Article 39 and the fixed parliamentary term.<sup>43</sup> In a concurring opinion, Justice Zeidler went even further. He pointed out that the FDP’s behaviour had precipitated a crisis of legitimacy: the FDP had pledged to work in coalition with the SPD in the 1979 election so by entering into a coalition with the CDU-CSU, the FDP broke their pledge. Thus, Zeidler argued that the new coalition government had no choice but to return to the electorate for the sake of its own legitimacy (Kommers, 1989: 128).

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<sup>42</sup> The case was brought to the Constitutional Court by a number of former members of the dissolved Bundestag. They chose to exercise their constitutional right to challenge the President’s power to dissolve the Bundestag in an *Organstreit* proceeding in which the Federal Constitutional Court settles disagreements between different organs of government (Kommers, 1989: 124). The members argued that the Chancellor and President violated the constitution by dissolving the Bundestag because the successful constructive vote of non-confidence had clearly demonstrated that Kohl had the support of a parliamentary majority. Therefore, “the premature dissolution arose out of deception, and was thus unconstitutional” (Roberts, 2009: 222).

<sup>43</sup> The Court found that due to the presence of Article 39 in the Basic Law there was in fact no general power to dissolve the Bundestag in the mid-term, even with the use of constructive non-confidence (Southern, 1994: 31).

The Court also suggested that the experience of the Bonn Republic had started a new convention. Precisely because constructive non-confidence had been so infrequently used since 1949, the Court found that the Basic Law created a representative democracy marked by general elections held at regular intervals. Thus, the people had elected a legislature that was expected to form a government which could last for the duration of the parliamentary term, and that would not be replaced by a significantly new government without new elections (Kommers, 1989: 128).

Roberts writes in his 2009 discussion on the *Bundestag Dissolution Case* that

it is important to note that any future successful employment of the constructive vote of no-confidence is likely to give rise to a similar situation as that in 1982, since there would again be a demand for legitimating of the new government by an early election... now [that] the 1983 decision of the Constitutional Court has set a precedent (Roberts, 2009: 222).

In effect, the convention hinted at by the Constitutional Court in the *Bundestag Dissolution Case* alters the operation of responsible government by making it much more populist in nature. That is, constructive non-confidence's ability to stabilize the parliamentary term generates a situation where both losing confidence and mid-term government transitions are generally unlikely and it primes voters to believe that they choose the government rather than the parliament. As a result, any mid-term election must be popularly approved.

Clearly, the 1982 confidence vote raises an interesting distinction between the legality of mid-term transitions and their legitimacy. This distinction is important for considering the practicality of constructive non-confidence in Canada. The 1982 German case demonstrates that constitutional legality does not equate to political legitimacy and parallels the 2008 prorogation and coalition crisis in Canada. Because constructive non-confidence is so effective at stabilizing the executive against the opposition, even in a hung legislature, it actually supports the expectation that the people are electing a government (rather than a parliament that then chooses – and perhaps replaces – a government). That is, constructive non-confidence in its original home seems to have contributed to the very elections-based sense of democratic legitimacy that Canadian proponents hope it will counteract in this country. German experience provides little support for the hope that constructive non-confidence will effectively reverse the Canadian expectation that substantial mid-term governmental transitions should be sanctioned by early elections.

### *Enhanced Executive Dominance*

One of the intentions of the reform agenda advanced by Aucoin, Jarvis and Turnbull (2011) is a reduction in prime ministerial power. They argue that executive dominance will decrease because their reforms remove the ability for the prime minister to exert *any* control through prorogation, snap elections, or delayed summoning of parliament. Beyond the impact of altering the reserve powers, Aucoin, Jarvis and Turnbull (2011) predict that the reform will empower the House of Commons to more aggressively amend (or vote down in a minority situation) government legislation because such defeats no longer count as confidence tests (Aucoin et al., 2011: 223). These constitutional reforms are only one part of their reform agenda and there are other institutional reforms for political parties and parliamentary governance proposed that will target executive dominance (Aucoin et al., 2011: 227-241). As already suggested in the previous section, Europe provides as little support for the hope that constructive non-confidence will decrease executive dominance as it does for the claim that it will enhance the democratic legitimacy of mid-term governmental transitions.

A close study of the origins of constructive non-confidence would have alerted its Canadian proponents to this prospect. As described in Chapter Three, executive stability was, in fact, the primary intention behind the resignation rule – the German Parliamentary Council adopted it to protect the executive from parliamentary instability and opposition “irresponsibility.” Certainly, European experience suggests that executive dominance would remain an important feature in Canada under conditions of constructive non-confidence. Thus, Bergman et al. (2003) find that the Spanish prime minister is among Europe’s most powerful. The German chancellor is less powerful but can also attain great dominance, as occurred under Adenauer.

In Spain, prime ministerial dominance comes from a number of factors including a reliance on one-party governments over coalitions, which tend to be the norm in Germany. This is because Spain’s d’Hondt electoral formula. Although it is classified as proportional, it produces results similar to Canada’s SMP system as it magnifies the results in favour of the victorious party.<sup>44</sup> This means that the Spanish prime minister does not have to rely on balancing

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<sup>44</sup> The d’Hondt proportional electoral system is another reason why Spain tends towards majoritarianism. The d’Hondt formula has even “manufactured” parliamentary majorities – Russell’s false majorities – on four occasions:

the demands of the coalition partners in the appointment process or later in cabinet decision-making. Instead, the Spanish prime minister must only concern him or herself with the input of other parties if he or she heads a minority government in order to pass necessary legislation (Gunther et al., 2005: 117). Much the same is true of government backbenchers and there is a relatively high degree of party discipline (Gunther et al., 2005: 118). In terms of institutional powers, the Spanish prime minister, like the Canadian counterpart, controls cabinet and has a virtually free hand on ministerial appointments (Heywood, 1995: 89-90). The system of constructive vote of non-confidence actually furthers this prime ministerial dominance because it provides prime ministers with greater security of tenure by making it much harder for the opposition to vote non-confidence (Gunther et al., 2005: 117). Accordingly, this combination of party-system and institutional powers leads to a high level of executive dominance in Spain. On Lijphart's scale of executive dominance 8.26 (see Table 6) Spain gets one of the highest scores (higher than Canada's) because of the long stretches its governments have remained in power.

The German case is more complicated than the Spanish case because the Bundestag was constructed as a working parliament with strong legislative committees as compared to a debating parliament, such as those found in the United Kingdom and Canada (Saalfeld, 1998: 53). As well, in the German political system the office of party chairman is separate from that of the chancellor candidate (Padgett, 1994a: 49-50). It is possible for one person to hold both positions, but it does not always occur. When a German chancellor does not concurrently hold the party chairmanship, his or her position is relatively weaker as a result of having less control over the party and having to negotiate with the parliamentary party's leader (Padgett, 1994b: 4).

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in the 1982, 1986, 2000, and 2011 elections. The 2000 election produced particularly distorted results as the Partido Popular earned 52 percent of the seats with little more than a third of the popular votes cast (Gunther et al., 2005: 116). The 1989 election also essentially produced a majority government because the Herri Batasuna returned four members but the party boycotted Parliament, leaving Prime Minister Gonzalez and the PSOE a virtual majority in the Congreso. The reason why the electoral system is so disproportional is the fact that the average district elects less than seven representatives and there are no supplementary party list seats to correct for this. Hence, Spain's index of proportionality is similar to plurality and majority electoral systems. (Lijphart et al, 1988: 14)

**Table 6: Index of Executive Dominance, 1945-2010**

	<b>Index of executive dominance</b>	<b>Average cabinet duration (years)</b>
New Zealand (Post MMP)	2.39	2.39
Belgium	2.57	2.57
Germany	3.80	3.80
New Zealand (average)	4.54	4.54
New Zealand (Pre MMP)	6.15	6.15
Canada	8.10	8.10
UK	8.12	8.12
Spain	8.26	8.26
Australia	9.10	9.10

Source: selected cases from Lijphart (2012: 120-121).

A German chancellor who manages to get elected to his or her party chairmanship can attain a strong position that is only checked by the political strength of the coalition partner. If the coalition partner is in a weak position, then the chancellor has few checks on his or her power. Both coalition partner weakness and chancellor chairmanship of the main government party occurred during the Adenauer era at the beginning of the Federal Republic and led to it being characterized as a deviant form of parliamentary democracy entitled *Kanzlerdemokratie* or “chancellor democracy” (Padgett, 1994a: 18). As no chancellor since Adenauer has exerted such control, there is the new term of *Koordinationsdemokratie* or “coordination democracy” that conceives the chancellor as the chief executive of policy who builds consensus in cabinet and oversees policy coordination between the ministries (Padgett, 1994a: 18-19; Sutherland, 1994: 79). This coordination role remains important, however, because the chancellor has to manage the coalition partners and as such is in the pivotal position between the parties to take substantial public credit for making government work (Niclauss, 2000: 70-71).

When it comes to the institutional powers of the German chancellor, there is some balance between the chancellor and other government ministers. The chancellor cannot interfere

substantially in departments because the Basic Law sets out the *Ressortprinzip* (department principle) that gives substantial autonomy to ministers in their departments (Southern, 1994: 33). Yet, that independence is limited: ministers are still dependent on the chancellor for their position as it is the chancellor, and not the cabinet, who is directly responsible to the Bundestag (Golay, 1958: 133). As well, the German chancellor is able to exert control over the cabinet through controlling the flow of information and who sits on what committee. Because the chancellor is informed earlier than other members of cabinet, he or she possess the key resource to coordinate and direct the flow of the government process. Thus, the chancellor's position at the centre of the formal and informal decision-making process means that so long as he or she has secured the coalition party's support, then he or she can effectively lead the executive branch. (Niclauss, 2000: 77)

Constructive non-confidence does not overly empower the chancellor because of the institutionalized consensual nature of modern German politics. Since the founding of the Federal Republic there has been a traditional hostility towards party conflict among both German elites and voters which gives opposition parties few electoral incentives to employ adversarial tactics against the government. Opposition parties are more likely to challenge the government in the more private atmosphere of parliamentary committees or the Joint Mediation Committee of the Bundestag and Bundesrat (Saalfeld, 1998: 62-63). This has meant that there is recognition of the necessity not to push political differences beyond a certain point and when such a point is reached, parties agree to a common position. The nature of parliamentary government in Germany is changed so that the dichotomy of government versus opposition is suppressed in favour of inter-party accord. (Southern, 1994: 38)

All of this combines to give Germany a lower rank in Lijphart's index of executive dominance (Table 6). Lijphart finds that between 1945 and 2010, the average cabinet duration was 3.80 years (2012: 120). It is interesting to note that this is higher than New Zealand's ranking after the introduction of MMP, although this probably speaks to the effect of the latter's three year term limit. However, Germany's executive dominance score is significantly lower than Spain's ranking, a finding that correlates with Bergman et al. (2003).

In Canada, constructive non-confidence is likely to operate more like the Spanish than the German model – i.e., in Canada, it is likely to enhance executive dominance. This is because

Canada lacks Germany's proportional electoral system and consensus-based politics, and shares Spain's tendency towards single-party governments. In fact, it is possible that the Canadian prime minister could become more powerful than the Spanish counterpart because the former can draw more authority from the Canada's party system and high level of party control and discipline. According to Bergman et al., the British prime minister ranks higher than the Spanish prime minister in their party system and party cohesion ranking (2003: 191). Since the Canadian prime minister is in a similar position to the British prime minister – some like Savoie (2008) posit that prime ministerial power is even stronger in Canada – adding constructive non-confidence brings the Canadian prime minister closer to the institutional powers of the Spanish prime minister but outranks the latter on the party system and party cohesion measure. Under the Aucoin, Jarvis and Turnbull (2011) proposal, the Canadian prime minister would have slightly fewer institutional powers because of the two-thirds dissolution rule. In Spain, the prime minister does have the virtual right of dissolution.

The Canadian proponents of constructive non-confidence hope that constructive non-confidence will lead to the mid-term replacement of sitting governments by new parliamentary alliances and coalitions. But how likely is this? Consider the fact that Canada has fewer competitive or effective parliamentary parties than Germany and Spain, with the average effective number of parliamentary parties between 1945 and 2010 being 3.09 for Germany, 2.66 for Spain, and 2.52 for Canada (Lijphart, 2012: 74-76). This means that there are fewer coalition options in Canada, something that is likely to change only with significant electoral-system reform. The fact that coalition governments are more likely if the parties involved are ideologically connected reduces the number of practical coalition options in Canada even further. In these circumstances, the ironic result of constructive non-confidence will often be to make the governing executive more, rather than less, immune to replacement by an alternative government.

Flanagan's analysis of potential of minimum connected winning coalitions in Canada helps us see why this is so. He discounts the Bloc Québécois (BQ) because its anti-system agenda make it an unacceptable coalition partner (Flanagan, 2010: 33). In any case, the BQ has recently almost disappeared from the federal parliament. This may or may not be a permanent

development, but to simplify the following analysis, I will set the BQ aside and focus on the Conservatives, Liberals, and NDP.

In considering possible coalitions, Flanagan also discounts the idea of a coalition of Liberals and Conservatives. Not only do the two major parties vying for government have little incentive to enter into a coalition with the Conservatives (Flanagan, 2010: 33), the idea of a grand coalition between major parties violates the minimum winning coalition principle, which holds that

having too much support could be almost as bad as having too little because you have to reward your supporters to keep them in the coalition. The larger the coalition, the smaller the individual share of benefits that can be provided, and the greater the risk that a crucial portion of your members might be won over to some other coalition (Flanagan, 1998: 78).

Moreover, Canada has no grand coalition history other than the Union government during the First World War. Canadian majoritarianism makes coalitions – and particularly grand coalitions – unlikely since the tendency is towards adversarial politics rather than the consensus-based politics found in Germany.

Alliances and coalitions between major and minor parties are more plausible and have occasionally occurred in Canadian history. However, in the case of the Conservative Party of Canada, there is (after the amalgamation of the Canadian Alliance and the Progressive Conservatives), no party to its right with which to create a coalition alternative to a Liberal government, and it is virtually unimaginable that the Conservatives and the NDP could form a coalition to unseat a minority Liberal government. The Conservatives and the NDP might well form a “minimum winning coalition” in purely numerical terms, but they would not be the kind of “minimum *connected* winning coalition” necessary to come together as a functioning government (Flanagan, 2010: 33). Thus, under the rules of constructive non-confidence – that the opposition cannot unseat a government unless is willing and able to replace it – a Liberal minority government would be much more insulated from opposition challenge than under either the status quo or the New Zealand protocol, both of which allow for new elections when a government is defeated by an opposition that will not, or cannot, form an alternative government. True, the Conservatives and the NDP could defeat a Liberal government and trigger “early” elections if they could muster two-thirds support in the Commons, but how likely is that?



By contrast, a Conservative minority government *could* more easily be replaced, under conditions of constructive non-confidence, by the more plausible minimum winning connected coalition of the Liberals and the NDP. Although the 2011 election called into question the continued status of the Liberals as one of Canada's two prominent contenders for government at the federal level, let us assume, for the moment, that they soon return to and maintain this status. In that case, the NDP would be a perennial junior partner in possible Liberal-led alliances or coalitions, a dispensable junior partner whenever elections returned a Liberal minority government (for reasons just explained), and a junior ally in re-establishing a Liberal-led government whenever a Conservative minority government is returned. In the latter case, moreover, the junior ally would not be in a position to defect and join with the Conservatives to form an alternative government and would rarely (if ever) be able to help the Conservatives trigger new elections under the two-thirds safety-valve provision.

In other words, constructive non-confidence would indeed facilitate the mid-term transition to alternative parliamentary alliances or coalitions involving Canada's two traditional government parties – the Liberals and Conservatives – but mainly (perhaps only) in one direction. The centrist Liberals, so long as they remained one of the two major parties, would have a substantial advantage, and once in power (either as a single-party minority or an NDP-supported alliance or coalition) would enjoy greater security, and hence executive dominance, than is currently the case.

This might change occasionally if the NDP tires of junior partner status and, after an election returning a Conservative minority government, refuses to cooperate with Liberals to vote constructive non-confidence. In such circumstances – i.e., when the NDP chooses not to be part of an alternative government – the executive dominance of a Conservative government would be enhanced by constructive non-confidence. At least until the NDP changed its mind, the Conservative government would be safe from either replacement or new elections (unless a two-thirds majority could be mustered in favour of the latter).

Things might also change if the NDP's 2011 attainment of official-opposition status portended the more fundamental realignment that has occurred in other liberal democracies, namely, the decline of centrist parties in favour of a greater polarization between major parties of the left (e.g. Labour) and the right (e.g. Conservative). In such circumstance the much-reduced

centrist party can become a hinge party, offering its services to either side of the primary division when neither of them wins a majority government. This is what recently happened in Britain, where the once strong Liberal party is now part of a coalition government with Conservatives. It is also the case in Germany where the centrist FDP is located ideologically between the larger SPD and CDU. Under conditions of constructive non-confidence such an alignment in Canada could perhaps generate more governmental transition and, as a corollary, weaken executive control. But this would require the centrist party to accept its reduced hinge status, something that takes time. In Canada, the Liberals still see themselves as a government party, not a hinge party. As long as that persists – i.e., for the foreseeable future – the Liberals might prefer to play a waiting game to accepting junior partner status in governments led by either of the other parties. Under conditions of constructive non-confidence this would likely mean waiting to try to win government in the next scheduled campaign rather than becoming a reliable ally of either side in a minority parliament. If that happens, the executive dominance of whatever minority government is in place will again be enhanced.

In sum, while constructive non-confidence does rein in the virtual right of the prime minister to the crown's reserve powers, whether it can reduce the overall phenomenon of executive dominance is debatable. In Germany, coalition government is a major check on the chancellor's power and yet, as we have just seen, the prospects of this check developing in Canada seem minimal. It seems more likely that combining constructive non-confidence with the current incarnation of the Canadian party system will serve to limit the responsiveness of the government to parliament and thus to public opinion. According to Smith, anything that disconnects "[t]he non-confidence convention ... from public opinion or the appraisal of public opinion by the political actors" (1999: 42) should be avoided. In her view, such a disconnect would result if the non-confidence convention "were to be ... completely formalized," as it certainly would be under a constructive non-confidence requirement. In that case,

the system as a whole would lose a major inter-election link with the electorate. Specifically, the electorate would lose the energy and efforts of an ambitious opposition seeking government-defeating opportunities, and the energy and efforts of a tenacious government seeking parliamentary strategies and procedures designed to fit a fractured public opinion. (Smith, 1999: 42)

For Smith, maintaining the fluidity of the convention is necessary to maintain the essential inter-election link between the government and the electorate (Smith, 1999: 42). From this perspective, the more flexible and evolutionary New Zealand protocol is a much better reform option than European-style constructive non-confidence.

### *The Much More Desirable New Zealand Protocol*

Based on the historical similarity of the New Zealand confidence protocol to current Canadian institutions, it is likely that it would have a much subtler impact in Canada. It would maintain the unwritten nature of responsible government because the conventions would be written down in a non-legally binding document and it would retain the flexibility of reform as conventions evolve. By recording conventions in a publicly accessible document, the conventions of responsible government and the New Zealand confidence protocol could be better enforced in the political realm than is currently the case in Canada (Aucoin and Turnbull, 2004; Russell, 2008; Aucoin et al., 2011).

Unlike constructive non-confidence, it is probable that the New Zealand protocol would fulfill more of the expectations placed upon it. The protocol was created to address precisely the same concerns as those that have sprung up in Canada – the instability of hung parliaments – and as such, it is a much more appropriate direction for Canada to take. It may not guarantee the degree of parliamentary stability within fixed election dates that constructive non-confidence does. Nor will it give the Commons as much control of dissolution and prorogation. Nevertheless, it moves modestly towards those goals without the unintended and counterproductive problems of constructive non-confidence discussed above.

The New Zealand protocol will increase parliamentary stability to a certain degree because the preference structure of the protocol encourages constructive voting over threatening early elections, especially when combined with fixed election legislation. Even though fixed election legislation could not be binding without a constitutional change to the office of the governor general, if the electorate chooses to enforce the convention then parties may prefer to sort out their issues within the House rather than face the electorate's wrath. The experience of New Zealand since 1996 illustrates that the protocol does foster parliamentary stability. Since the first MMP election in 1996, none of the eight governments formed has fallen due to a loss of

confidence. This makes the parliamentary stability of the New Zealand protocol comparable to that found by De Winter (1995) for positive resignation rules, which includes constructive non-confidence.

Although the New Zealand protocol does encourage parliamentary stability, the strongest impact of the protocol is the explicit legitimization of mid-term transitions at any point during the parliamentary term. This is a complete overhaul of the current state of mid-term transitions in Canada which, as outlined in Chapter Four, tend to be seen as legitimate only very early in the parliamentary term, or perhaps not legitimate at all. The New Zealand protocol does reduce the question of democratic legitimacy because it reaffirms parliament's sovereign right to make and break governments.

It is worth noting that in New Zealand this right has never been used under the New Zealand protocol, primarily because of the short parliamentary term. The one instance where a mid-term government transition almost occurred proves the rule that they are constitutionally and democratically acceptable. In August 1998 when the National-New Zealand First coalition fell apart, a mid-term transition was openly contemplated by all of the relevant political actors. During the political uncertainty it was clear that Governor General Hardie Boys was willing to ask the Labour party to form a government if the National government fell. However, Clark and her Labour party refused, stating publicly that she would prefer an election over forming an alternative government (Hardie Boys, 1998). Notably, Clark did not seek to join forces with other opposition parties in the House of Representatives and force the issue of an election by trying to bring down the now minority National government and instead waited until the next election. In the interim, Shipley's National government remained in the office because some former New Zealand First members preferred to retain their cabinet positions rather than leave the government benches and it secured support from ACT New Zealand (Barker and McLeay, 2000: 143).

Lastly, what about the impact of the confidence protocol on the executive-legislative relationship? Here the evidence is mixed. There is certainly evidence indicating some shift from executive-dominated majoritarianism caused by both the 1996 electoral-system reform and the ensuing reform of the confidence convention. For example, in cases when confidence is unclear

or lost, the executive is stopped from dominating parliament, particularly through the use of the reserve powers. In this respect, executive dominance is clearly reduced.

Similarly, legislative debates are more vibrant and it is harder for the prime minister to dominate cabinet and individual ministries since not all are headed by ministers from the same party (Palmer and Palmer, 2004: 13-17). Legislation has slowed down too as the House of Representatives passed on average 107 government Bills per calendar year between 1997 and 2006, down from 160 Bills per year in the decade before the adoption of MMP (Malone, 2009: 16).

The ability for the executive to dominate parliament has declined too because governing parties have opted for minorities – either coalition or single-party – rather than majorities. Therefore, they have had to rely on support from non-government parties that have signed support agreements to hold confidence and pass legislation. “The prevalence of minority governments, has meant that any proposed government policy requiring legislative approval cannot exist in isolation from the reaction it is likely to receive in the legislative chamber” (Malone, 2009: 6). There is no denying that minority situations are very difficult to navigate, and cabinet has to be more considerate of parties outside of cabinet (and even outside of confidence and support agreements) to pass legislation.

Such evidence convinced Lijphart that New Zealand after 1996 moved significantly away from executive-dominated majoritarianism towards the consensus category of democratic regimes. Thus, he ranks the country in the middle of the 36 stable democracies featured in his index of executive dominance (Table 6) with an average cabinet duration of 2.39 years (2012: 120-121).

Yet Lijphart arguably overstates the New Zealand shift. One reason is that he equates confidence and support agreements with government coalition agreements. Another reason is that Lijphart categorizes the Clark coalition governments as being different cabinets even though Labour’s coalition partners were on all three occasions a small group of MPs all led by Jim Anderton, or just Anderton himself in the 2005 Clark government. The name of his progressive MPs may have changed, but the group itself remained consistent, which allowed Labour to essentially retain the same government composition from 1999 to 2008. Certainly Lijphart’s

conclusions have not gone uncontested. Barker and McLeay, for example, suggest that majoritarianism and adversarialism still remain dominant in New Zealand's Parliament.

The more consultative input into legislative decision-making characteristic of legislatures such as the Bundestag was not achieved. When the government had a majority, the power of the executive to dictate policy direction remained strong. Whether one is assessing consensualism of style and process or consensualism of policy outcomes (Blondel, 1995), MMP had only a minor immediate impact on the parliamentary party system (Barker and McLeay, 2000: 143).

In other words, in a majority coalition government, the only consensual necessity is to consult with the governing parties rather than with the House as a whole. The same is true of the minority governments that have supply and confidence agreements. Consensus is unnecessary, only negotiation with enough parties to ensure legislation is passed so the government can survive minority government. But, of course, we have just noted that minority governments (either single-party or coalition) have come to dominate New Zealand parties, and that this might require more consensualism. Barker and McLeay may be overstating their case as well.

The most appropriate conclusion seems to be that New Zealand has moved to a middle ground. While it is true that the consistency of hung parliaments under MMP has shifted New Zealand away from its strong majoritarian Westminster tradition, it has not gone far as Lijphart's consensus democracies. Even in the now typical situation of minority governments, there is evidence of party behaviour that is consistent with Barker and McLeay's (2000) analysis. Parties remain adversarial and would rather operate in smaller coalition or single-party governments and then work with other parties to secure support. Moreover, the smaller parties in the House must be careful of what policies and legislative debates they get involved in as they enjoy fewer resources than National and Labour (Malone, 2009: 12). The governing parties have often secured support through confidence and support agreements and by doing so with more parties than necessary they were able to maintain a dominant position: the bargaining power of one support party is significantly tempered when there is another support party available to provide an alternative source of legislative votes (Malone, 2009: 5; 19). There is something to Barker and McLeay's conclusion that, although incentives exogenous to parliament have created a multi-party system since 1996, there have been "fewer endogenous changes to reshape the incentives governing parliamentary behaviour" (2000: 149). Certainly, the New Zealand parliament does

not have the same conception of itself as other chambers such as the German Bundestag: as a Westminster-style parliament, the House of Representatives is a debating parliament rather than a working parliament (Saalfeld, 1998).

Delving into executive-legislative relations in New Zealand shows that if Canada desires to reduce the power of the prime minister, the New Zealand protocol is not sufficient. Neither is a Cabinet Manual-type document enough to ensure the changes in political culture and parliamentary behaviour which are necessary to reduce the negative and adversarial nature that has dominated recent hung parliaments in Canada. Instead, switching the electoral system is a much better driver of change because a proportional representation system makes hung parliaments the norm and forces parties to work together, at least on an ad hoc basis so that parliament can stay in session for most of the term. In the near future however, it seems unlikely that Canada is headed for any substantial electoral reform.

As for prime ministerial/executive power, the New Zealand protocol curtails it somewhat – generally in terms of limiting the opportunity for bad faith in the use of the crown’s reserve powers – but the real limitation on executive dominance is the MMP electoral system. It is MMP that inspired Palmer and Palmer to alter the title of the fourth edition of their classic text on New Zealand politics and government from *Unbridled Power* to *Bridled Power*. Yet, the degree to which the political executive’s power is bridled remains open for debate.

Comparing constructive non-confidence and the New Zealand confidence protocol shows that the latter is the more desirable of the two reforms. The New Zealand protocol cannot guarantee the hard and fast rules of the constructive non-confidence reform package that make it unequivocally clear what a non-confidence vote is and when parliament can be dissolved. But as a less radical departure from Canada’s responsible government, the protocol does not nurture any of the dangers warned about above. The New Zealand protocol reaffirms the role of parliament and the responsibility of government to the people’s elected representatives.

## **Conclusion**

This chapter has demonstrated that the adoption of the New Zealand protocol is both more achievable and more desirable. Regarding achievability, it is unclear whether the critical

junction needed to generate either reform has occurred. However, the exogenous shock that could result in the New Zealand protocol would not have to be as strong as for constructive non-confidence. The latter reform was born in Germany out of an extreme critical juncture: regime failure. In Spain, the reform was added to the post-Franco constitution to protect the democratic regime against another collapse. Only a very powerful shock could inspire a country to insulate the executive and severely limit the legislature's ability to remove a government from office, as constructive non-confidence does. In Canada, one would need a critical juncture of sufficient magnitude to generate constitutional amendments under the very difficult unanimity formula. Such a critical juncture has not occurred in this country. In comparison, importing the New Zealand protocol has far fewer barriers and is easier to achieve. It is based in constitutional convention and thus stays much closer to the path of Canadian responsible government.

On the desirability side, there are a number of detailed reasons why we should be wary of constructive non-confidence in Canada. Constructive non-confidence does not live up to the expectations placed upon it. Although it will stabilize the parliamentary term, it does so in ways that generally also enhance executive stability and thus executive dominance, contrary to one of chief goals of its Canadian promoters. If European experience is any guide, it may also democratically delegitimize mid-term governmental transitions, thus again upsetting the goals and expectations of its promoters. This is a significant price to pay for clarifying constitutional conventions through constitutional codification.

As for the New Zealand protocol, while it does not promise the same reduction of prime ministerial power that Aucoin, Jarvis and Turnbull (2011) promote for their constitutional reform package, it does offer a much more predictable path forward for Canada. In all likelihood, much would remain the same under a New Zealand-style convention protocol, except that mid-term transitions would be ranked higher in constitutional preference structure than today in Canada and prime ministers that do not clearly hold confidence would be limited by the caretaker convention and could not access the reserve powers. Although these implications of the New Zealand protocol may seem minor compared to the more dramatic (and more risky) transformation of constructive non-confidence, they represent reform that can help change how Canadians think of their parliamentary system of government and inject some much-needed confidence.



## CHAPTER 6: CONCLUSION

The election of a Conservative majority on May 2, 2011 pushed the debate on how to stabilize minority government towards the fringes of political discourse in Canada. Institutional reform remains on the public agenda, but the reality of majority government has once again shrouded the inner workings of responsible government from view and removed much of the pressure for reforming the confidence convention. Now that Canada has returned to its “normal state” – away from the apparent aberration of minority government – reform is simply no longer as prominent as it was during the most recent run of minority governments.

Yet, even though the impetus for reform has slowed, we should not ignore the debate centred on reform to Canada’s confidence convention and responsible government. Minority government will reoccur in the future, once again raising questions of how to stabilize hung parliaments, including how to clarify the confidence convention to secure it against partisan manipulation. The New Zealand confidence protocol and constructive non-confidence are two respectable reforms, proposed by academics who strongly desire the democratization of the unwritten constitution by setting down the rules of the game in some form of public document. The reform proposals advocated by Aucoin and Turnbull (2004), Russell (2008), and Aucoin, Jarvis and Turnbull (2011), especially the New Zealand confidence protocol, have found supportive audiences in Canada (see Chapter Two). However, both reforms have important implications for Canadian political institutions and the political process, and failing to flesh out those implications is a noteworthy gap in the current literature.

Adopting reform without full consideration can lead to institutional contradictions down the road as the case of constructive non-confidence demonstrates. Constructive non-confidence comes from a very different type of parliamentary system, one based on consensus politics and the constitutionally entrenched dispersion of power between different political institutions. Because the Canadian system is not premised on the same principles, constructive non-confidence will not operate in the same way as it does in Germany. It is thus both curious and regrettable that Canadian proponents of constructive non-confidence have paid so little attention to precisely how it has worked abroad and why it might work differently here. Because the New Zealand protocol stays much closer to the Canadian tradition of responsible government it seems

likely to spring fewer future surprises if it were adopted. Here too, however, Canadian academics have conducted little examination of how protocol functions on the ground in New Zealand, perhaps because they have taken the shared similarities for granted (see for example Aucoin and Turnbull, 2004; Russell, 2009b; Russell and Milne, 2011; Harland, 2011). This thesis brings the much-needed examination of actual practice in New Zealand and Europe to bear in assessing the appropriateness of the two reforms for Canada. The thesis combines the lessons of foreign experience with a counterfactual analysis of how the two proposals would have affected the major constitutional issues between 2004 and 2011 that galvanized the reformers.

### **Summary of the Argument**

Such academic reformers as Aucoin and Turnbull (2004), Russell (2008), and Aucoin, Jarvis and Turnbull (2011) expect the New Zealand protocol and constructive non-confidence to bring three improvements to Canadian parliamentary practice in minority-government circumstances: 1) enhanced stability of the term-length of minority parliaments, 2) the default legitimacy (or requirement) of mid-term government transitions; and 3) reduced executive dominance. These are of course inter-related and reinforcing reasons. For example, the default legitimacy of mid-term transitions discourages or prevents defeated governments from cutting short the parliamentary term. This in turn empowers the legislative branch and its ability to hold the executive accountable, thus reducing prime ministerial power.

Both experience abroad and counterfactual analysis show that the constructive nature of the reform proposals – semi-constructive for the New Zealand protocol and full constructiveness for the constructive non-confidence – does indeed discourage or eliminate partisan games of political chicken based on early election threats. That is, both proposals achieve some of what the reformers had in mind. There are, however, important differences.

While the New Zealand protocol would certainly legitimize mid-term transitions, its ability to stabilize the parliamentary term and reduce prime ministerial power is only modest, except in situations when confidence is unclear or lost. In such instances, the protocol would significantly alter Canadian practice by designating the prime minister as a caretaker prime minister without unrestricted access to the reserve powers.

In comparison, constructive non-confidence would generate real change in all three of the areas of concern to the reformers, but not always in the predicted manner. In fact, European-style constructive non-confidence is actually more likely to dash some of the reformers' hopes than to fulfill them. While parliamentary terms have certainly been stabilized in Europe, this has come at the cost of insulating the executive and increasing its dominance. Moreover, while mid-term transitions are clearly *constitutionally* legitimate, they have over time suffered a loss of *democratic* legitimacy. Thus, true mid-term transitions from an incumbent government to a real alternative are rare. The few mid-term transitions that do occur tend to be part of a strategy to engineer a rare early election. Constructive non-confidence's ability to reduce prime ministerial power is, after considering the cases of Spain and Germany, unlikely. Indeed, greater executive stability and the democratic illegitimacy of mid-term transitions actually bolster executive dominance. Constructive non-confidence seems counterproductive to some of the hopes Canadian reformers have for it.

Perhaps it is just as well, then, that constructive non-confidence requirements are virtually impossible to achieve in the Canadian context. The system would require constitutional amendments with the support of the federal parliament and all ten provincial legislatures. Such an outcome might be imaginable if Canada experienced the kind of regime crisis that led to constructive non-confidence in German and Spain, but a crisis of such scope and magnitude has not occurred in Canada, nor does anything like it loom on the horizon.

A much more likely reform – and a more desirable one – is the more modest evolutionary adjustment of Canadian constitutional conventions along the lines of the New Zealand protocol. Following New Zealand practice, the protocol should be incorporated in a publicly accessible document that carries the weight of constitutional convention and could, as is the case in New Zealand and the United Kingdom, be published by the Privy Council Office under the supervision of the Clerk. The Clerk and the Privy Council staff would also be responsible for amending the document to reflect new political precedents that develop out of the organic evolution of responsible government. In order for the Canadian version of the cabinet manual to take on the authority of constitutional convention, it would have to be accepted and acknowledged by all relevant political actors. The public aspect is also important because it gives

citizens the opportunity to familiarize themselves with the constitutional conventions and enforce them when political controversies unfold.

The New Zealand protocol introduces a sufficient amount of “constructiveness” in Canada without needing a constitutional amendment to entrench a constructive vote of non-confidence. It will stabilize hung parliaments and reduce prime ministerial power to a certain extent by providing a greater degree of certainty in the confidence convention and by protecting the reserve powers from prime ministers who have lost or may soon lose confidence. Ultimately however, New Zealand’s parliamentary stability is a result of MMP and all parties accepting the normalcy of hung parliaments. Until Canada decides to move away from its SMP electoral system, the impact of the New Zealand protocol in Canada will be much more limited than in New Zealand.

### **Contributions and Directions for Future Research**

This thesis has sought to fill in aspects of the two reform proposals that have received too little attention by exploring the New Zealand protocol and constructive non-confidence in their home environs and comparing them to each other. This was easier in the case of the New Zealand protocol because there has been more written on it than constructive non-confidence. Even so, it is clear that as institutions they have generated little controversy in the countries that use them, meaning that neither the New Zealand protocol nor the constructive vote of non-confidence are popular research topics and their presence seems to be taken for granted (see Chapter Three). There are few studies that expressly cover constructive non-confidence and how it has been used in the various European countries that have entrenched it in their constitutions. This thesis is thus the most extensive coverage of constructive non-confidence available – at least in the English language.

Of course, there is much more that can be done regarding constructive non-confidence because, as Chapter Five illustrates, it affects the political system beyond limiting non-confidence votes and protecting the executive from “irresponsible” parliamentary behaviour. Virtually all references to constructive non-confidence in the literature recognize that it enhances the power of the prime minister (for example, Roberts, 2009; Gunther et al., 2005; Bergman et al., 2003; De Winter, 1995; Sutherland, 1994). However, these observations have generated little

in-depth study of the impact of constructive non-confidence on executive dominance. Without further comparative research on the topic, we have only the most basic understanding how constructive non-confidence boosts prime ministerial power and in what ways. Indeed, there is very little comparative research on any dimension of this resignation rule in the six European countries that use it, especially in Hungary, Slovenia, and Poland.

Another, broader area of research is the effect of constructive non-confidence on the role of parliament and parliamentary sovereignty. It is evident that constructive non-confidence regimes (which include fixed election dates) precondition the citizenry to expect that they directly decide which main parties will form the government, and that this expectation has stripped lasting mid-term governmental transitions of their democratic legitimacy. As a result, constructive non-confidence challenges two of the traditionally essential functions of parliament, government formation and government termination or replacement if it confidence is lost (Franks, 1987: 5). This is particularly true in Germany where parties typically declare their preferred coalition partners during election campaigns so that voters have a chance to decide which bloc of parties they prefer (Niclauss, 2000: 77). And, as the 1982 constructive non-confidence vote and early dissolution demonstrated, Germans felt that the mid-term transition had to be subjected to the electorate for popular approval. Delving into how constructive non-confidence changes the role and authority of parliament could generate interesting findings about parliamentary democracy.

This study's comparison of the New Zealand protocol and European-style constructive non-confidence has also brought to light a new insight for the literature on non-confidence votes and resignation rules. In Chapter Three, I note that the literature classifies non-confidence votes based on whether an absolute or relative majority is required to pass them and on whether the votes are negative or constructive (for example, see De Winter, 1995; and Bergman et al., 2003). This typology (represented in Table 1) divides the "constructive" dimension firmly between negative (ordinary) and constructive non-confidence votes and does not adequately provide for developments like the New Zealand confidence protocol. It is true that prior to 1996, New Zealand used the negative non-confidence vote that has been typical of the Westminster system's confidence convention, but the post-1996 New Zealand confidence protocol has moved the conventions surrounding non-confidence votes in a more constructive direction that no longer

fits the negative category. The same is true of the United Kingdom, which since 2010 has incorporated the New Zealand protocol in a cabinet manual of its own. At the same time, these conventional developments do not fit the fully “constructive” category of Table 1. Without the additional category found in Table 2, there is no way to account for the middle-ground “constructiveness” represented by the New Zealand protocol, which *encourages* constructive voting on non-confidence votes but does not *require* it. This new category, which may at some point include Canada, is in need of further study.

### **The Path Forward for Canada**

Constructive non-confidence does not deliver on the hopes placed upon it and it should no longer be a part of the reform debate for stabilizing minority government in Canada. Instead, the New Zealand confidence protocol is a much more accommodating, viable, and achievable reform that maintains Canada’s practice of responsible government and the constitutional conventions that underpin the legislative-executive relationship. It does not require entrenchment – making it much easier to adopt considering Canada’s complex constitutional politics – and preserves the flexibility of responsible government to adapt and respond to changing circumstances without a formal constitutional amending procedure.

The Westminster parliamentary system relies on adversarial politics to keep politicians honest, expose corruption, and ensure that governments are responsive to public opinion (Smith, 1999: 40). The New Zealand protocol does not tamper with the model; it ensures the responsiveness of parliamentary government for the future by protecting parliament’s ability to make and break governments and to hold them accountable for the people of Canada. Constructive non-confidence, and particularly the proposal by Aucoin, Jarvis and Turnbull (2011), does not do so: by binding the confidence convention into only one form of non-confidence vote, it makes it very difficult for parliament to hold the government ultimately accountable by withdrawing confidence. Constructive non-confidence severely limits the most important tool parliament has at its disposal for holding government to account.

Those who support constructive non-confidence want to free parliament to vote down government legislation without fear of forcing an early election, thus achieving better scrutiny on a daily basis (Aucoin et al., 2011: 222). Yet the fact remains that Canada’s Westminster-style

parliament needs adversarial politics to function at its best. The Canadian parliament was not founded on ideals of political consensus as was the case in Germany. Constructive non-confidence functions better in a consensus democracy because governments are expected to work with parliament to pass legislation so that multiple minority viewpoints can be represented. Parliamentary opposition in such regimes has a different character – it knows that government, generally formed by a coalition, seeks to build a consensus to pass its legislative agenda and that parliamentary structures exist to make that happen. It does not need to resort to adversarial politics that are the mainstay of Westminster majoritarianism to put pressure on the government. Since Canada remains majoritarian, both in terms of parliamentary and especially electoral institutions, constructive non-confidence is a poor fit. Without more consensual politics – a change that is unlikely to occur without electoral reform – constructive non-confidence deals a weighty blow to parliamentary opposition.

Even if one prefers a New Zealand-style convention protocol, as I do, there are legitimate issues about how to achieve it in Canada. For example, Hicks (2012) worries that, in Canada's excessively partisan atmosphere, the Privy Council, which is viewed as the prime minister's department (Savoie, 1999b), could not be trusted to draw up a cabinet manual. Yet somehow the New Zealand Cabinet Office and the United Kingdom Cabinet Office, which are hardly non-partisan bodies, managed to put partisanship aside sufficiently to produce acceptable conventional protocols. In New Zealand, the protocol developed to a large degree out of the leadership of the Governor General, Michael Hardie Boys, who spoke publicly on a number of occasions to outline the principal conventions of responsible government.<sup>45</sup> However, for Canada to follow in New Zealand's path and have governors general who take a public role in discussing the constitution and responsible government, Canada will have to abandon the practice (perhaps partial convention) of non-disclosure as identified by Sossin and Dodek, namely that governors general do not publicly release justifications for how and why they use

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<sup>45</sup> In New Zealand, each governor general generally makes at least one speech on how they perceive their constitutional role. As well, while New Zealand was settling into the new era of MMP, Governor General Hardie Boys actively reassured the New Zealand public that he would uphold the principle of responsible government and not intervene in the political process (1996; 1997). He also described his thinking during the political crisis in 1998 when it was unclear whether or not there might be an early election or mid-term transition (Hardie Boys, 1998). In Chapter Two this is discussed in greater depth because much of what Governor General Hardie Boys discussed became part of the 2001 edition of the Cabinet Manual.

their reserve powers (2009: 91). Although the practice of non-disclosure encourages frank discussion between the prime minister and the governor general when controversial constitutional issues are on the table, it does not help foster the public's confidence in the governor general and the Canadian crown. Canada might be better off following in New Zealand's footsteps if, from time to time, the governor general made public speeches on important aspects of the constitution or explained some of the constitutional conventions or principles driving their decisions after the controversial political events have run their course.<sup>46</sup>

The United Kingdom has now finished its cabinet manual and while the initial leadership was provided by the Cabinet Office, it was subsequently reviewed by the House of Commons and House of Lords. Committees in both Houses consulted widely to determine whether the draft was sufficient and what the effects would be of the document before the final version was published by the Cabinet Office in 2011. The process taken by the United Kingdom was very different than in New Zealand, where the Cabinet Manual was already an authoritative document on the functioning of the executive branch and had a few sections that covered the executive's relations with the legislative branch. Therefore, there was less need for the House of Representatives to review the Cabinet Manual when the confidence convention was detailed in the 1996 version and subsequently expanded upon in 2001 and 2008. Given that additions were added as a result of statements made by the actors affected by them – notably the Governor General and party leaders – it is clear that the New Zealand confidence protocol was accepted and seen as non-partisan and binding. In Canada, like the United Kingdom, there has been no publicly recognized<sup>47</sup> Cabinet Manual on which to build. Canada might thus wish to follow the United Kingdom model of broader consultation to secure a broadly acceptable document.

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<sup>46</sup> The April 17, 2013 speech by Governor General Johnston is somewhat of an exception to the Canadian pattern. He spoke of the necessary role that the crown plays in a system of responsible government. However, without a recent political controversy or significant constitutional change to respond to, there was no need for the Governor General to provide as full a discussion on the constitutional principles of responsible government as some New Zealand governors general – most notably Hardie Boys – have done.

<sup>47</sup> Canada does have a document, the *Manual of Official Procedure of the Government of Canada*, which is comparable in purpose to earlier editions of the New Zealand Cabinet Manual (Privy Council Office, 1968). It has never been publicly released and was uncovered through an access to information request (completed in 2011). It is primarily focused on procedure (i.e. how to make appointments, proper ceremonial actions for the governor general, etc) and does not contain anything specific to the confidence convention. However, there is some mention of the principle of restraint, and a more recent secret Privy Council Office document, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants during an Election*, elaborated on it in 2008.



## **Final Thoughts**

I have argued that the New Zealand confidence protocol is a better fit for Canada should Canada choose to pursue reform to the confidence convention. Based on the ramifications discussed in previous chapters, which reform is preferable depends on how far Canada desires to legislate or entrench the confidence convention to force parliamentary stability and constructive voting. Both reforms move Canada from the negative resignation rule category towards a more constructive category. The New Zealand protocol retains responsible government's flexibility and ability to evolve and reflect changes to convention as they develop. It would place Canada in a unique position regarding resignation rules because although a negative resignation rule would formally be required, political actors would be encouraged to constructively withdraw confidence, especially if fixed-date legislation became more effective in minority-government circumstances. This provides a reform that improves the stability of minority government but refrains from moving too far away from the Canadian tradition of Westminster parliamentary democracy and responsible government. Constructive non-confidence cannot deliver this historical continuity because it is the result of a major political crisis, or critical juncture, during the Weimar Republic when German democracy failed. Canadian democracy has not progressed – or rather regressed – to the point where such drastic constitutional overhaul is necessary. Parliamentary democracy continues to function despite the political controversies of the recent period of minority government in Canada. Therefore, it is more important to ask ourselves to what degree we want to constrain responsible government and its evolving constitutional conventions. In particular, we need to ask whether the more rigid parliamentary stability created by constructive non-confidence is worth the loss in the government's responsiveness to parliament and the Canadian people?

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## APPENDIX A: THE NEW ZEALAND PROTOCOL

Below are the relevant sections from the Cabinet Manual (2008: 83-84) that make up the New Zealand confidence protocol.

### Sections Relevant to Mid-Term Transitions:

- 6.53 A basic principle of New Zealand's system of responsible government is that the government must have the confidence of the House of Representatives to stay in office. A government may lose the confidence of the House during its parliamentary term.
- 6.54 Where loss of confidence is clear (for example, where the government has lost a vote of confidence in the House), the Prime Minister will, in accordance with convention, advise that the administration will resign. In this situation:
- (a) a new administration may be appointed from the existing Parliament (if an administration that has the confidence of the House is available – see the information about government formation in paragraphs 6.36 – 6.42); or
  - (b) an election may be called (see paragraphs 6.56 – 6.58). Until a new administration is appointed, the incumbent government continues in office, governing in accordance with the caretaker convention. (See paragraphs 6.16 – 6.35.)
- 6.55 In some cases, the confidence of the House may be unclear, for example, in the case of a change in coalition arrangements. The incumbent government will need to clarify where the confidence of the House lies, within a short time frame (allowing a reasonable period for negotiation and reorganisation). The caretaker convention applies in the mid-term context only when it becomes clear that the government has lost the confidence of the House.

### Sections Relevant to Early Elections:

- 6.56 As the Governor-General's principal adviser, the Prime Minister may advise the Governor-General to dissolve Parliament and call an election. (See paragraphs 2.4 and 2.6<sup>48</sup>). Usually that advice will be timed in accordance with the electoral cycle.

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<sup>48</sup> For convenience, here are the two sections referred to from the Cabinet Manual (2008: 18):



- 6.57 In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government.
- 6.58 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention. (See paragraphs 6.16 – 6.18.<sup>49</sup>) The Governor-General would expect a caretaker Prime Minister to consult other parties on a decision to advise the calling of an early election, as the decision is a significant one. (See paragraph 6.20.) It is the responsibility of the members of Parliament to resolve matters so that the Governor-General is not required to consider dissolving Parliament and calling an election without ministerial advice. (See paragraph 1.15 on the reserve powers.<sup>50</sup>)

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2.4 The Prime Minister has several key constitutional roles. The Prime Minister is the principal adviser to the Sovereign and to the Sovereign's representative, the Governor-General, as long as the government commands the confidence of the House, and the Prime Minister maintains support as the leader of that government.

2.6 The Prime Minister alone has the right to advise the Governor-General to:

- (a) appoint, dismiss, or accept the resignation of Ministers;
- (b) dissolve Parliament and call a general election.

<sup>49</sup> These sections describe the caretaker convention, stating that government action is curtailed after an election (if the incumbent government has lost) or when confidence is unclear during a parliamentary term (Cabinet Manual, 2008: 78). More detail is found in subsequent sections: section 6.20 addresses situations when confidence is unclear and its subsection, 6.20.2 (Cabinet Manual, 2008: 79), which concerns extraordinary and controversial political decisions:

6.20 (d) Decisions relating to those matters should:

- be deferred, if possible, until the political situation is resolved; or
- if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (for example, by extending a board appointment or by rolling over a contract for a short period); or
- if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue.

<sup>50</sup> The inclusion of the reference to section 1.15 of the Cabinet Manual indicates that when confidence is unclear or lost, the prime minister does not have the right to advise and expect the governor general to use of any of the prerogative powers. While section 6.58 only explicitly states this in relation to dissolution, section 1.15 is relevant to the entirety of the reserve powers (summoning, prorogation, and dissolution).

1.15 In only a very few cases may the Governor-General exercise a degree of personal discretion, under what are known as the "reserve powers". Even then, convention usually dictates what decision should be taken. (Cabinet Manual, 2008: 9)

## **APPENDIX B: ELECTIONS IN TWO WESTMINSTER DEMOCRACIES**

The following tables present the data collected on governments and elections in both Canada and New Zealand going back to each country's acquirement of dominion status, in 1867 and 1890 respectively. The use of the single member plurality electoral system in both countries consistently resulted in majority, single-party governments that typically lasted for the duration of the parliamentary term. However, because there was no concept of fixed lengths for parliamentary terms and fixed election dates during the 1800s, the timing of new elections was largely left up to the executive, and in particular the prime minister. Therefore, Canada and New Zealand often had early elections or elections that were just a few months before the four-year mark and thus were on the cusp.

### CANADIAN GOVERNMENTS, 1867-2014

Parliament Term	First Minister	Election Date	Government Composition	Government Type	Reasons for Change	Early Dissolution?
1867-1872	Macdonald	20 September 1867	Conservatives	Majority	Term expired	No
1872-1874	Macdonald	12 October 1872	Conservatives	Majority	Pacific Scandal, Macdonald resigned	
	MacKenzie		Liberals	Minority	Conservatives held a majority	Yes
1874-1878	MacKenzie	22 January 1874	Liberals	Majority	Term expired	No
1878-1882	Macdonald	17 September 1878	Conservatives	Majority		Yes
1882-1887	Macdonald	20 June 1882	Conservatives	Majority	Term expired	No
1887-1891	Macdonald	22 February 1887	Conservatives	Majority	Term expired	No
1891-1896	Macdonald	5 March 1891	Conservatives	Majority	Macdonald died	No
	Abbott		Conservatives	Majority	Abbott resigned	No
	Thompson		Conservatives	Majority	Thompson died	No
	Bowell		Conservatives	Majority	Bowell resigned due to cabinet revolt	No
	Tupper		Conservatives		Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1896-1900	Tupper	23 June 1896	Conservatives	Minority	Tupper defeated in the House	No
1896-1900	Laurier	23 June 1896	Liberals	Majority	Term expired	No
1900-1904	Laurier	7 November 1900	Liberals	Majority	Term expired	Cusp
1904-1908	Laurier	3 November 1904	Liberals	Majority	Term expired	Cusp
1908-1911	Laurier	26 October 1908	Liberals	Majority	Early election to settle the question of free trade with the US	Yes
1911-1917	Borden	21 September 1911	Conservatives	Majority	Term expired	No
1917-1921	Borden	17 December 1917	Unionist	Majority	Borden resigned	No
1921-1925	Meighen	6 December 1921	Unionist	Majority	Fluctuation between majority and minority	Yes
	King		Liberals	Minority		yes
1925-1926	King	29 October 1925	Liberals	Minority	To avoid censure, King resigns (King-Byng Affair)	No (but attempted)
	Meighen		Conservatives	Minority	Confidence vote lost	Yes

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1926-1930	King	14 September 1926	Liberals	Minority (but supported by 11 Liberal-Progressives)		Yes
1930-1935	Bennett	28 July 1930	Conservatives	Majority	Term expired	No
1935-1940	King	14 October 1935	Liberals	Majority	Term expired	No
1940-1945	King	26 March 1940	Liberals	Majority	Term expired	No
1945-1949	King	11 June 1945	Liberals	Majority	King retires	No
	St-Laurent		Liberals	Majority	Term expired	Cusp
1949-1953	St-Laurent	27 June 1949	Liberals	Majority	Term expired	Cusp
1953-1957	St-Laurent	10 August 1953	Liberals	Majority		Yes
1957-1958	Diefenbaker	10 June 1957	Progressive Conservatives	Minority	Diefenbaker sought to capitalize on Liberal weakness	Yes
1958-1962	Diefenbaker	31 March 1958	Progressive Conservatives	Majority	Term expired	No
1962-1963	Diefenbaker	18 June 1962	Progressive Conservatives	Minority	Non-confidence vote and cabinet revolt	Yes
1963-1965	Pearson	8 April 1963	Liberals	Minority		Yes
1965-1968	Pearson	8 November 1965	Liberals	Minority	Pearson retired	No
	Trudeau		Liberals	Minority		Yes
1968-1972	Trudeau	25 June 1968	Liberals	Majority	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1972-1974	Trudeau	30 October 1972	Liberals	Minority	Government defeated on its budget	Yes
1974-1979	Trudeau	8 July 1974	Liberals	Majority	Term expired	No
1979-1980	Clark	22 May 1979	Progressive Conservatives	Minority	Government defeated on its budget	Yes
1980-1984	Trudeau	18 February 1980	Liberals	Majority	Trudeau resigned	No
	Turner		Liberals	Majority	Term expired	No
1984-1988	Mulroney	4 September 1984	Progressive Conservatives	Majority		Cusp
1988-1993	Mulroney	21 November 1988	Progressive Conservatives	Majority	Mulroney resigned	No
	Campbell		Progressive Conservatives	Majority	Term expired	No
1993-1997	Chretien	25 October 1993	Liberals	Majority		Yes
1997-2000	Chretien	2 June 1997	Liberals	Majority		Yes
2000-2004	Chretien	27 November 2000	Liberals	Majority	Chretien resigned	No
	Martin		Liberals	Majority		Yes
2004-2006	Martin	28 June 2004	Liberals	Minority	Government defeated on its budget	Yes
2006-2008	Harper	23 January 2006	Conservatives	Minority		Yes

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
2008-2011	Harper	14 October 2008	Conservatives	Minority	Censure motion	Yes
2011-2014	Harper	2 May 2011	Conservatives	Majority		

#### **NEW ZEALAND GOVERNMENTS, 1890-2014**

1890-1893	Balance	5 December 1890	Liberal	Majority	Term expired	No
1893-1896	Seddon	28 November 1893	Liberal	Majority	Term expired	No
1896-1899	Seddon	4 December 1896	Liberal	Majority	Term expired	No
1899-1902	Seddon	6 December 1899	Liberal	Majority	Term expired	No
1902-1905	Seddon	25 November 1902	Liberal	Majority	Term expired	No
1905-1908	Seddon	6 December 1905	Liberal	Majority	Seddon died	No
	Hall-Jones		Liberal	Majority	Resigned in favour of Ward	No
	Ward		Liberal	Majority	Term expired	No
1908-1911	Ward	17 November -1 December 1908	Liberal	Majority	Term expired	No
1911-1914	Ward	7-14 December 1911	Liberal	Minority	Ward resigned	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1911-1914	McKenzie		Liberal	Minority	Liberals were able to stay in power by relying on Independents. Eventually they lost confidence	No
1914-1919	Massey	11 December 1914	Reform	Minority	Term expired	No
	Massey		Reform	Minority	Stalemate, invites Liberals into a coalition	No
	Massey		Reform - Liberals	Coalition (majority)	Term expired	No
1919-1922	Massey	16 December 1919	Reform	Majority	Term expired	No
1922-1925	Massey	7 December 1922	Reform	Minority	Term expired	No
1925-1928	Massey	4 November 1925	Reform	Majority	Massey died	No
1925-1928	Bell		Reform	Majority	Bell served as caretaker only	No
1928-1931	Coates	14 November 1928	Reform	Majority	Term expired	No
	Ward		United	Minority	Retired due to health	No
1931-1935	Forbes	2-Dec-31	United	Minority	Term expired	No
	Forbes		United-Reform ("National coalition")	Coalition (majority)	Term expired	No
1935-1938	Savage	27-Nov-35	Labour	Majority	Term expired	No



<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1938-1943	Savage	15 October 1938	Labour	Majority	Savage died	No
	Fraser		Labour	Majority	Term expired	
1943-1946	Fraser	25 September 1943	Labour	Majority	Term expired	No
1946-1949	Fraser	27 November 1946	Labour	Majority	Term expired	No
1949-1951	Holland	30 November 1949	National	Majority	Term expired	No
1951-1954	Holland	1 September 1951	National	Majority	Term expired	No
1954-1957	Holland	13 November 1954	National	Majority	Resigns due to health	No
	Holyoake		National	Majority	Term expired	
1957-1960	Nash	30 November 1957	Labour	Majority	Term expired	No
1960-1963	Holyoake	26 November 1960	National	Majority	Term expired	No
1963-1966	Holyoake	30 November 1963	National	Majority	Term expired	No
1966-1969	Holyoake	26 November 1966	National	Majority	Term expired	No
1969-1972	Holyoake	29 November 1969	National	Majority	Holyoake resigned	No
	Marshall		National	Majority	Term expired	No
1972-1975	Kirk	25 November 1972	Labour	Majority	Kirk died	No
	Watt		Labour	Majority	Watt only acting prime minister	No
	Rowling		Labour	Majority	Term expired	No
1975-1978	Muldoon	29 November 1975	National	Majority	Term expired	No
1978-1981	Muldoon	25 November 1978	National	Majority	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1981-1984	Muldoon	28 November 1981	National	Majority	Snap election for renewed mandate	Yes
1984-1987	Lange	14 July 1984	Labour	Majority	Term expired	No
1987-1990	Lange	15 August 1987	Labour	Majority	Term expired	No
1990-1993	Bolger	27 October 1990	National	Majority	Term expired	No
1993-1996	Bolger	6 November 1993	National	Majority	coalition created	No
	Bolger	11 September 1994	National-ROC	Majority coalition	New coalition formed	No
	Bolger	28 June 1995	National-ROC	Minority coalition (Support from Christian Democrats and United New Zealand)	New coalition formed	No
	Bolger	28 August 1995	National	Minority (support from Christian Democrats, United New Zealand, and ROC)	ROC party leaves the coalition	No
	Bolger	28 February 1996	National-United New Zealand	Majority coalition (support from Christian Democrat)	Several National MPs cross the floor	No
	Bolger	3 April 1996	National-United New Zealand	Minority coalition (support from Christian Democrats)	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1996-1999	Bolger	12 October 1996	National-New Zealand First	Majority coalition	Bolger resigns after cabinet revolt	No
	Shipley		National Party-New Zealand First	Majority coalition	New Zealand First left the coalition	No
	Shipley		National Party	Minority (support from independents)	Term expired	No
1999-2002	Clark	27 November 1999	Labour-Alliance	Coalition minority (coalition shy of a majority by 1 seat. Support provided by a "cooperation agreement" with the Greens)	Snap election for renewed mandate. Polls looked good for Labour Party and the Alliance was disintegrating	Cusp
2002-2005	Clark	27 July 2002	Labour-Progressive	Coalition minority (confidence support provided by United Future. Co-operation agreement with Greens)	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
2005-2008	Clark	17 September 2005	Labour-Progressive	Coalition minority (“confidence and support agreement” with United Future and New Zealand First. Cooperation agreement with the Green Party)	Term expired	No
2008-2011	Key	8 November 2008	National	Minority (confidence and supply agreements with ACT NZ, United Future, and the Maori Party)	Term expired	No
2011-2014	Key	26 November 2011	National	Minority (confidence and supply agreements with ACT NZ, United Future and the Maori Party)		

## **APPENDIX C: ELECTIONS IN COUNTRIES USING CONSTRUCTIVE VOTES OF NON-CONFIDENCE**

The tables included in this appendix cover the parliamentary terms and governments of the six European countries with constructive non-confidence that have been referenced in this thesis. The tables only include the parliamentary terms from the time of democratization in those countries, which is when the six cases incorporated the constructive vote of non-confidence into their constitutions. Therefore, Germany is the first country to have entrenched the constructive resignation rule in 1949, followed by Spain in 1978, Hungary in 1989, Slovenia in 1991, Poland in 1992, and finally Belgium in 1995.

All of these countries have experienced relatively stable parliamentary terms since constructive non-confidence was introduced. Only Belgium has proven significantly unstable, but that as has been noted is the result of the difficult process of government formation in the country. Because of the barriers towards forming governments efficiently in the wake of an election, the political instability begins before constructive non-confidence has a chance to make a real difference.

## GERMAN GOVERNMENTS, 1949-2014

Parliament Term	First Minister	Election Date	Government Composition	Government Type	Reasons for Change	Early Dissolution?
1949-1953	Adenauer	14 August 1949	CDU/CSU-FDP-DP	Majority coalition	Term expired	No
1953-1957	Adenauer	6 September 1953	CDU/CSU-FDP-DP-GB/BHE	Majority coalition (CDU/CSU 1 seat short of a majority)	GB/BHE split over the CDU's policies	No
	Adenauer		CDU/CSU-FDP-DP	Majority coalition	FDP split, some form the FVP	No
1957-1961	Adenauer	15 September 1957	CDU/CSU-DP-FVP	Majority coalition	Term expired	No
	Adenauer		CDU/CSU-DP	Majority coalition (CDU/CSU has outright majority)	DP leaves the coalition	No
1961-1965	Adenauer	17 September 1961	CDU/CSU	Majority	Term expired	No
	Adenauer		CDU/CSU-FDP	Majority coalition	FDP left the coalition	No
	Adenauer		CDU/CSU	Minority	FDP rejoined the coalition	No
1965-1969	Adenauer	19 September 1965	CDU/CSU-FDP	Majority coalition	Adenauer resigned	No
	Erhard		CDU/CSU-FDP	Majority coalition	Term expired	No
	Erhard		CDU/CSU-FDP	Majority coalition	FDP left the coalition	No
	Erhard		CDU-CSU	Minority	CDU-CSU forced Erhard to resign	No
	Kiesinger		CDU/CSU-SPD	Majority coalition (The "Grand Coalition")	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1969-1972	Brandt	28 September 1969	SPD-FDP	Majority coalition	Constructive non-confidence attempted and early election achieved through use of Article 68	Yes
1972-1976	Brandt	19 November 1972	SPD-FDP	Majority coalition	Brandt resigned	No
1976-1980	Schmidt	3 October 1976	SPD-FDP	Majority coalition	Term expired	No
	Schmidt		SPD-FDP	Majority coalition	Term expired	No
1980-1983	Schmidt	5 October 1980	SPD-FDP	Majority coalition	FDP withdraws from the coalition	No
	Schmidt		SPD	Minority	CDU/CSU successfully use constructive non-confidence	No
	Kohl		CDU/CSU-FDP	Majority coalition	Early election manipulated through use of Article 68	Yes
1983-1987	Kohl	6 March 1983	CDU/CSU-FDP	Majority coalition	Term expired	No
1987-1990	Kohl	25 January 1987	CDU/CSU-FDP	Majority coalition	Unification, 144 new members elected by the German Democratic Republic's People's Chamber (eastern DSU incorporated into the coalition)	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1987-1990	Kohl		CDU/CSU-FDP-DSU	Majority coalition	Term expired	No
1990-1994	Kohl	2 December 1990	CDU/CSU-FDP	Majority coalition	Term expired	No
1994-1998	Kohl	15 October 1994	CDU/CSU-FDP	Majority coalition	Term expired	
1998-2002	Schröder	27 September 1998	SPD-Greens	Majority coalition	Term expired	No
2002-2005	Schröder	22 September 2002	SPD-Greens	Majority coalition	Early election manipulated through use of Article 68	No
2005-2009	Merkel	18 September 2005	CDU/CSU-SPD	Majority coalition (Grand coalition)	Term expired	No
2009-2013	Merkel	27 September 2009	CDU/CSU-FDP	Majority coalition	Term expired	No
2013-2014	Merkel	22 September 2013	CDU/CSU-SPD	Majority coalition		

#### **SPANISH GOVERNMENTS, 1977-2014**

1977-1979	Suárez	15 June 1977	UCD	Minority	Post-constitution approval election	Yes
1979-1982	Suárez	1 March 1979	UCD	Minority	Suárez resigned	No



<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
	Sotelo		UCD	Minority	Many deputies defected from the UCD to other parties	Yes
1982-1986	González	28 October 1982	PSOE	Majority	Elections were early in 23 April 1986, but were supposed to be in October, 1986	Cusp
1986-1989	González	22 June 1986	PSOE	Majority	Early elections called	Yes
1989-1993	González	29 October 1989	PSOE	Minority (PSOE 1 seat short of majority but Basque HB deputies boycott giving PSOE a virtual majority)	Election not due to June 1990, Gonzalez argued the need to prepare for the European Common market	Yes
1993-1996	González	6 June 1993	PSOE	Minority (government forms broad support agreement with CiU and PNV)	Elections were early in 9 Jan 1996. Due to budget failure and CiU withdrawing its support for the PSOE	Yes

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1996-2000	Aznar	3 March 1996	Partido Popular	Minority (government forms broad agreement with CiU and PNV). HB delegates boycotted.	Term expired	No
2000-2004	Aznar	12 March 2000	Partido Popular	Majority	Term expired	No
2004-2008	Zapatero	14 March 2004	PSOE	Minority	Term expired	No
2008-2011	Zapatero	9 March 2008	PSOE	Minority	PSOE desired an early election	Yes
2011-2014	Rajoy	20 November 2011	Partido Popular	Majority		

#### **HUNGARIAN GOVERNMENTS, 1989-2014**

1990-1994	Antall	24 March and 8 April 1990	MDF/FKgP/KDNP	Majority coalition	Antall died	No
	Boross		MDF/FKgP/KDNP	Majority coalition	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1994-1998	Horn	8 and 29 May 1994	MSzP/SzDz	Majority coalition (although MSzP had absolute majority)	Term expired	No
1998-2002	Orban	10 and 24 May 1998	FIDESZ/FKgP/ MDF	Majority coalition	Term expired	No
2002-2006	Medgyessy	7 and 21 April 2002	MSzP/SzDz	Majority coalition	Medgyessy resigned over disputes with the SzDz	No
2002-2006	Gyurcsany		MSzP/SzDz	Majority coalition	Term expired	No
2006-2010	Gyurcsany	9 and 23 April 2006	MSzP/SzDz	Majority coalition	The SzDz left the coalition	No
	Gyurcsany		MSzP	Minority	Gyurcsany resigns and is formally removed from office through constructive non-confidence	
	Bajnai		MSzP	Minority	Term expired	No
2010-2014	Orban	11 and 25 April 2010	FIDESZ/KDNP	Majority (FIDESZ and KDNP ran the election campaign together - first non-coalition gov since 1990)		

## SLOVENIAN GOVERNMENTS, 1991-2014

Parliament Term	First Minister	Election Date	Government Composition	Government Type	Reasons for Change	Early Dissolution?
1990-1992	Peterle	8 April 1990	Slovene Christian Democrats (DEMOS)	Majority coalition	DEMOS coalition falls apart and Drnovšek chosen as the compromise candidate	No
	Drnovšek		LDS/SDS/Democratic Party/Greens/United List of Social Democrats/Socialists	Majority coalition	Elections provided for in the new Constitution, completed December 1991.	Yes
1992-1996	Drnovšek	6 and 10 December 1992	LDS-SKD-SLS-SDS-United List/Associated List	Majority coalition	United List/Associated List leaves the coalition	No
	Drnovšek		LDS-SKD-SLS-SDS	Minority coalition	Term expired	No
1996-2000	Drnovšek	10 December 1996	LDS-SLS-SDS-SKD	Minority coalition	Government fell due to disagreements with the Slovenian People's Party and LDS withdraws from the coalition	No
	Bajuk		SLS/SKD		Term expired	No
2000-2004	Bajuk	15 October 2000	SLS/SKD	Majority coalition	LDS joins the coalition	No
	Drnovšek		LDS/SLS+SKD/Associated List/DeSUS		Drnovšek resigns to run for the Slovene presidency	

Parliament Term	First Minister	Election Date	Government Composition	Government Type	Reasons for Change	Early Dissolution?
	Rop		LDS/SLS+SKD/Associated List/DeSUS	Majority coalition	Term expired	No
2004-2008	Janša	3 October 2004	SDS/New Slovenia/SLS/DeSUS	Majority coalition	Term expired	No
2008-2011	Pahor	21 September 2008	SD/Zares/LDS/DeSUS	Majority coalition	Pensioners and ZARES withdraw from the coalition	No
	Pahor		SD/LDS	Minority coalition	Pahor loses confidence and an early election is called	Yes
2011-2014	Janša	4 December 2011	SDS/Civic List/DeSUS/New Slovenia/SLS	Majority coalition	Lost a constructive non-confidence vote	No
	Bratušek		Positive Slovenia/SDS/Civic List/DeSUS	Majority coalition		

#### POLISH GOVERNMENTS, 1992-2014

1991-1993	Olszewski	27 October 1991	ZChN-PC-PL and 2 others	Coalition	President removed Olszewski from office	No
	Pawlak		PSL attempt	None formed	President removed Pawlak from office due to Pawlak failing to form a government	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
1991-1993	Suchocka		UD-KLD-ZChN-4 others	Majority coalition	Sejm withdrew confidence without selecting a new prime minister. Therefore, the President dissolved the Sejm	Yes
1993-1997	Pawlak	19 September 1993	SLD-PSL	Majority coalition	Constructive non-confidence used by coalition members against Pawlak	No
	Oleksy		SLD-PSL	Majority coalition	Oleksy resigned	No
	Cimoszewicz		SLD-PSL	Majority coalition	Term expired	No
1997-2001	Buzek	21 September 1997	AWS-UW	Majority coalition	UW leaves the coalition	No
	Buzek		AWS	Minority	Term expired	No
2001-2005	Miller	23 September 2001	SLD-PSL	Minority coalition	PSL ejected from the coalition	No
	Miller Belka		SLD SLD-UP	Minority Majority coalition	Miller resigned PSL joins the coalition	No No
	Belka		SLD-UP-PSL	Majority coalition	Term expired	No
2005-2007	Marcinkiewicz	25 September 2005	PiS	Minority	Marcinkiewicz resigned	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
2005-2007	Kaczynski		PiS/Self-Defense/LPR	Coalition	Coalition collapsed, Sejm voted to dissolve itself	Yes
2007-2011	Tusk	21 October 2007	PO/PSL	Majority coalition	Term expired	No
2011-2014	Tusk	9 October 2011	PO/PSL	Majority coalition		

#### **BELGIAN GOVERNMENTS, 1995-2014**

1991-1995	Dehaene	24 November 1991	CVP-PSC-SP-PS	Majority coalition	Early election for renewed mandate	Yes
1995-1999	Dehaene	21 May 1995	CVP-PSC-SP-PS	Majority coalition	Dissolution in the wake of adoption of a declaration to revise the Constitution	Yes
1999-2003	Verhofstadt	13 June 1999	VLD-PRL-SP-PS-Agalev-Ecolo	Majority coalition	Term expired	No
2003-2007	Verhofstadt	18 May 2003	VLD-MR-SP-PS	Majority coalition	Term expired	No

<b>Parliament Term</b>	<b>First Minister</b>	<b>Election Date</b>	<b>Government Composition</b>	<b>Government Type</b>	<b>Reasons for Change</b>	<b>Early Dissolution?</b>
2007-2010	Verhofstadt	10 June 2007	VLD-MR-CD&V-PS-CDH	Majority coalition	Verhofstadt resigns for Leterme (he took government on the King's request)	No
	Leterme		VLD-MR-CD&V-PS-CDH	Majority coalition	Leterme resigned due to allegations of trying to influence the Appeal Court	No
	Herman Van Rompuy		VLD-MR-CD&V-PS-CDH	Majority coalition	Resigns to become President of the European Council	No
	Leterme		VLD-MR-CD&V-PS-CDH	Majority coalition	Leterme forced to resign when VLD withdrew from the coalition. Finally, the government collapsed after prolonged crisis since 2007 election. Early dissolution due to House and Senate voting to review the constitution.	Yes
2010-2014	Leterme	13 June 2010		Caretaker	Due to inability to form a government, Leterme stays on in a caretaker capacity	No
	di Rupo		PS-SP-CDH-CD&V-VLD-MR	Majority coalition		