Writing Canada's Political Constitution

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In this article, the authors argue that the codification of Canada's Constitution should not be limited to its legal component. Rather, the authors propose that Canada's unwritten political constitution, comprised of non-legal rules and norms that characterize Canadian democracy, ought to be codified. The authors contend that codifying the political constitution would both give political actors an opportunity to reflect and define the constitution while simultaneously modernising the political rules entrenched in the constitution. In advocating for this position, the authors analyze comparative codifications in New Zealand, Australia, and the United Kingdom. While traditional arguments for codification have focused neatly on the development of cabinet manuals, the authors propose that codification of the political constitution should go beyond such conventional methods. The authors identify the shortcomings of the traditional cabinet manual and argue that both Parliament and the executive have a key role to play in "writing the unwritten". While being wary of the challenges that present themselves to this task, the authors argue that the need for political actors in constitutional conversations necessitate change in Canada's constitutional landscape.

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Introduction

Canada's constitution is legal and political. The legal component, which includes the *Constitution Acts, 1867* and *1982*, is more easily recognized and appreciated by lawyers, politicians, and the wider public. Indeed, the study of the constitution in Canada often begins, and too often ends, with the federal division of powers (found in the *Constitution Act, 1867*)[1] and the *Canadian Charter of Rights and Freedoms* (*Charter*)[2] (located in the *Constitution Act, 1982*)[2].[3] However, Canada's political constitution is equally important. The political constitution is comprised of the non-legal rules and norms that underpin Canadian democracy and governmental accountability.[4] They shape how power is exercised within the executive and in the houses of parliament. Yet, the political constitution is more difficult to grasp than its legal counterpart.

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

2. *Constitution Act, 1982*, s 35, Schedule B to *Canada Act, 1982* (UK), 1982, c 11.

3. *Canadian Charter of Rights of Freedoms*, s 7, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

4. These two components do not constitute the legal constitution in its entirety, or the written legal constitution in its entirety.

5. See generally *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*]; Andrew C Banfield, "Canada" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) at 189.

This is partly because the legal constitution is largely written, while the political constitution is unwritten. The legal constitution is supreme law, visible for all to see, whereas the political constitution is the "hidden wiring",[6] known mostly to practitioners and scholars. Although the legal and political constitutions each form an essential part of Canadian constitutionalism, the written quality of the former tends to ensure its dominance over the latter.

The perceived pre-eminence of the legal over the political affects how political and judicial actors understand their roles and responsibilities under the constitution. Because they have a duty to interpret the legal constitution, courts are generally treated as the principal constitutional actors in Canada. Parliament and the executive are necessarily involved in crafting and enforcing the law, respectively, but the courts ultimately determine the meaning of the legal constitution.[7] By contrast, the political constitution has been shaped and continues to be defined by political actors. Yet, here too, courts have been called upon to take a leading role, outlining the contours of the political rules of the constitution but stopping short of enforcing them.

It has been argued that this tendency would be accelerated if the political constitution were to be codified.[8] Greater codification could erase the boundary between the legal and political constitutions, making courts the primary interpreter of both, and further minimize the influence and importance of political actors in constitutional matters. Writing the political constitution would also risk "ossifying" the political rules of the constitution, robbing them of the flexibility and adaptability that set them apart from law.[9]

6. Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (London, UK: Victor Gollancz, 1995).

7. The political branches also lead efforts to amend the constitution, though this process is less frequent and more fraught than the executive and the legislature's central constitutional functions. See generally Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's University Press, 1994); Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004).

8. At its most basic, codification involves reducing to writing. As we discuss, however, codification occurs on a spectrum, from noting down to providing an authoritative account of rules. For a discussion of the basic definition in the context of Westminster constitutions, see Andrew Blick, *The Codes of the Constitution* (Oxford, UK: Hart Publishing, 2016) at 1–2.

9. Emmett Macfarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" (2022) 55:2 Can J Political Science 322.

This article challenges these arguments against codifying the political constitution. We argue that writing the political constitution would give political actors an opportunity to better define Canada's constitutional arrangements and empower them in the constitutional matters that affect them directly. In offering these arguments, we seek to move beyond the reasons scholars typically offer in favour of codifying the political aspects of the constitution, whether in a cabinet manual, ministerial code, or other document.[10] Calls to codify the political constitution have tended to intensify after events that raise questions about the application of a particular constitutional convention or conventions, or the propriety of the Prime Minister's or another minister's actions.[11] While this is understandable, viewing codification primarily as a solution to crisis and controversy falls short. Instead, we say that the process of committing the political constitution to writing would give political actors—parliamentarians, ministers, and senior parliamentary and government officials—an opportunity to reflect on the political rules and norms that govern Canada's pluralistic, multinational federation at this point in its constitutional development.[12] Our focus, then, is not on codification as a check on political actors, but as a vehicle to revitalize their roles and responsibilities as authors of the political constitution—an organic, evolving set of rules and norms that governs how our legislative and executive bodies operate.

At first blush, the need for further codification may appear unclear. After all, it could be argued that the political constitution can already be found in official documents published over the last several decades. But there is currently no comprehensive and publicly accessible guide that sets out the constitutional framework within which parliamentarians and the executive operate, nor is

10. See e.g. Peter Aucoin, Mark Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Publishing, 2011); Peter Russell, "Codifying Conventions" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) 233 [Russell, "Codifying Conventions"]; Ryan Alford, "Two Cheers for a Cabinet Manual (And a Note of Caution)" (2017) 11 JPPL 43. Calls for reform that are addressed here include certainty, transparency, and accountability.

11. See Russell, "Codifying Conventions", *supra* note 10.

12. Our definition of political actors reflects the fact that parliamentarians who hold ministerial offices will approach a cabinet manual differently than those who do not hold such offices, given their role within the executive. While they are not partisan politicians, senior officials should also be included, since they are involved in advising ministers and parliamentarians on these matters and have been visible in recent disputes about the political constitution in Canada.

there, by extension, any of the ritual that might accompany the creation of such a document, such as political actors updating the guide periodically and agreeing to be bound by it.[13] In addition, while both the houses of Parliament and the executive have published official documents outlining their understanding of various aspects of the political constitution, they have not approached this task collaboratively. Doing so might reveal differences in interpretation or other forms of disagreement. Debates between the legislature and the executive about parliamentary privilege and cabinet secrecy, among other things, highlight the importance of dialogue between the two branches about how different parts of the constitution interact and how particular rules should be interpreted. Equally important, existing documents tend to take a narrow view of the political constitution. Treating the constitutional relationship between the state and Indigenous peoples as exclusively legal, for instance, discourages parliamentarians from properly considering it as part of the legislative process.

The argument we advance, therefore, is twofold. First, producing a guide to the political constitution would give political actors an opportunity to articulate and define the political constitution.[14] A cooperatively drafted and regularly updated guide would signal that political actors are committed to upholding an ever-evolving political constitution and resolving disagreements without recourse to third parties. Of course, we acknowledge that the courts or the Crown may need to intervene in certain constitutional confrontations. However, following Andrew Blick and Peter Hennessey, we argue that the development and operation of the political constitution is best managed by political actors themselves, while also acknowledging that a "gentleman's agreement" with respect to unwritten rules is no longer sufficiently effective or transparent.[15]

13. See Grant Duncan, "New Zealand's Cabinet Manual: How Does it Shape Constitutional Conventions?" (2015) 68:4 Parliamentary Affairs 737 at 742–43.

14. In Canada, it is possible to recognize that a political constitution exists and operates alongside a legal constitution that includes the *Constitution Acts*. Canada therefore has both a political and legal constitution. In the United Kingdom, the debate over political and legal constitutionalism is more fundamental. For an overview of the British question, see Graham Gee & Grégoire Webber, "What Is a Political Constitution?" (2010) 30:2 Oxford J Leg Stud 273; Martin Loughlin, "The Political Constitution Revisited" (2019) 30:1 King's LJ 5.

15. Andrew Blick & Peter Hennessy, *Good Chaps No More? Safeguarding the Constitution in Stressful Times* (London, UK: The Constitution Society, 2019) [Blick & Hennessy, *Good Chaps*].

Second, the process of writing the political constitution could be leveraged to modernize the political rules of the constitution in a broad sense. Although core constitutional conventions, such as confidence and cabinet solidarity, are well established and generally well understood by practitioners and scholars, contemporary Canadian political constitutionalism could better reflect the demands of federalism and intergovernmental relations, Parliament's responsibilities with respect to Indigenous peoples and the *Charter*, and the balance of power between the executive and the legislature in areas ranging from democratic accountability to foreign affairs.

We begin this article by reviewing New Zealand, Australia, and the United Kingdom's experiences drafting a cabinet manual and consider the merits of this vehicle for partial codification of the political constitution. Next, in Part Two, we reflect on how a Canadian guide to the political constitution might be similar to and different than a cabinet manual. Part Three discusses the potential challenges associated with developing such a guide. In Part Four, we elaborate on the value of political actors taking responsibility for the political constitution, and on how the process of writing the political constitution could be harnessed to modernize some of its elements. We conclude by arguing that the legal and the political constitutions share a common normative foundation and that a guide to the political constitution that is properly debated and accepted by political actors would contribute to upholding these norms in both the legal and political spheres.[16]

I. Comparative Codifications

The political constitution has been codified to some degree in the four core Westminster states: New Zealand, the UK, Canada, and Australia. As Blick explains, codification can take various forms; the exact scope of these efforts depends on which rules and norms a jurisdiction chooses to codify.[17] For instance, manuals of parliamentary procedure and practice could be included, since the operation of Westminster legislatures is intimately connected with political rules.[18] One could also include codes of conduct for ministers and political staff, since the political constitution is concerned with accountability

16. See Gee & Webber, *supra* note 14.

17. See Blick, *supra* note 8.

18. See David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 2013) at 18.

for personal behaviour as well as policymaking. Depending on the subject matter, studies and reports produced by government departments and parliamentary researchers could be included too.[19] For example, official studies and parliamentary reports on the scope of the royal prerogative could be considered codifications of the political constitution, since determining how this power applies to novel circumstances is a matter of political judgment, subject to review by the courts.[20]

A narrower view of codification focuses on cabinet manuals. When Canadian scholars have discussed codifying the political constitution, cabinet manuals have been their principal focus, reflecting the reality that codification is typically an executive exercise.[21] Cabinet manuals are largely focused on the operations of the political executive and have been executive-driven. They provide the government's view of how core constitutional conventions should operate, including those relating to government formation and the duration of parliaments. As we argue later in this article, cabinet manuals face important limitations, and codifying the political constitution should not be limited to producing a cabinet manual. However, a comparative review of these manuals demonstrates the value of codification efforts, best practices related to codification, and where Canada has lagged behind other Westminster states in regards to codification.

New Zealand was the first of the four jurisdictions to publish a publicly available cabinet manual. Initially released in 1979, New Zealand's cabinet manual has been approved by each successive ministry. This has ensured that each new cabinet expresses its understanding and acceptance of the guidance the manual provides. The New Zealand manual has also undergone continual revision.[22] The latest major revision occurred in 2008.[23]

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19. See, for instance, the British Ministerial Code: UK, Cabinet Office, *Ministerial Code* (London: Cabinet Office, 2022).

20. See House of Commons, "The Royal Prerogative" by Gail Bartlett & Michael Everett, House of Commons Briefing Paper, No 03861 (17 August 2017); UK, Ministry of Justice, *The Governance of Britain - Review of the Executive Prerogative Powers: Final Report* (London: October 2009).

21. See James W J Bowden & Nicholas A MacDonald, "Cabinet Manuals and the Crown" in D Michael Jackson & Philippe Lagassé, eds, *Canada and the Crown: Essays on Constitutional Monarchy* (Montreal & Kingston: McGill-Queen's University Press, 2013) 179 at 179, 184 [Bowden & MacDonald, "Cabinet Manuals"].

22. See Alford, *supra* note 10 at 56.

23. See New Zealand, Department of the Prime Minister and Cabinet, *Cabinet Manual*, 2017, preface.

The ability to update the cabinet manual highlights one of the strengths of this type of document. Unlike parliamentary statutes, or an entrenched, written constitution, a cabinet manual can easily adapt to new rules. This has proven particularly helpful in New Zealand. In the 1990s, the New Zealand Parliament adopted mixed-member proportional representation as its electoral system. Although this did not fundamentally change the New Zealand Constitution or the functioning of government, it did introduce new considerations around government formation and the role of the Governor General. It also required the executive to rethink the rules of cabinet solidarity given that governments would henceforth be composed of a coalition of parties rather than a single party. New Zealand has also emphasized transparency around cabinet decision-making and pushed for stronger conflict of interest regulations for ministers after they leave office. The cabinet manual reflects these innovations too and makes them publicly available with ministerial endorsement. In this way, the New Zealand cabinet manual provides both guidance and consensus on the rules that apply. In the words of Michael Webster, former Secretary to the Cabinet and Clerk of the Executive Council, New Zealand's cabinet manual has provided "clarity in moments of political flux".[24]

Australia followed New Zealand with the publication of a cabinet handbook in 1983. Now in its fourteenth edition, the Australian handbook is squarely focused on the operations of cabinet, eschewing discussions of government formation and the role of the Governor General.[25] Australia has complemented its cabinet handbook with other related guidelines, including a handbook for public servants who support the Federal Executive Council,[26] a handbook on preparing the government's legislative programme,[27] and guidance on the caretaker conventions.[28] As with New Zealand's cabinet manual, the regular updating of the Australian cabinet handbook allows the document to reflect the evolution of political norms, rules, and expectations, albeit from the perspective of the executive alone. Notably, the latest version of the Australian handbook addresses the operations of the national cabinet, which is compromised of the federal Prime Minister, state premiers, and territorial chief ministers. The national cabinet was established in March 2020 to ensure a coordinated

24. Michael Webster, "IPANZ Presentation: NZ Cabinet Manual", Remark, (2017) at 1.

25. See Austl, Commonwealth, Department of the Prime Minister and Cabinet, *Cabinet Handbook* (14th ed) (Government of Australia: 2020).

26. See Austl, Commonwealth, Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook 2021* (2021).

27. See Austl, Commonwealth, Department of the Prime Minister and Cabinet, *Legislative Handbook* (Canberra: Australian Government Publishing Service, February 2017).

28. See Austl, Commonwealth, Department of the Prime Minister and Cabinet, *Guidance on Caretaker Conventions* (2021).

response to the COVID-19 pandemic, and has become the permanent replacement of the Council of Australian Governments.

The UK published its cabinet manual in 2011.[29] The manual was part of a series of reform proposals and political negotiations that occurred during Gordon Brown's Labour government (2007–2010) and the Conservative-Liberal Democrat coalition (2010–2015). Efforts to provide clarity around the uncodified rules of the British constitution began in earnest in the 1990s, though calls for such reforms had been around for some time. The cabinet manual was drafted by the executive and scrutinized by parliamentary committees. The decision to produce the cabinet manual reflected wider reform considerations and the "short-term" politics of the coalition.[30] Unlike other reforms from this period, such as the ill-fated *Fixed-Term Parliaments Act*,[31] the cabinet manual has been accepted without much controversy.[32] It has codified key constitutional rules and norms and is meant to evolve over time. To date, however, it remains a static document. In 2015, the House of Commons' Political and Constitutional Reform Committee recommended that the cabinet manual be revised.[33] In July 2021, the UK House of Lords Select Committee on the Constitution followed suit, issuing a report urging the government to update the cabinet manual in response to Brexit and other events.[34] So far, however, successive Conservative prime ministers have resisted these calls to update the cabinet manual. While this could change under a Labour government committed to constitutional reform, the executive's resistance shows that codification efforts can be difficult to coordinate between branches of state.

Devolution has meant that the cabinet manual includes a discussion of how the central government and Parliament at Westminster interact with the administrations and legislatures in Scotland, Wales, and Northern Ireland. Having been published before the UK's withdrawal from the European Union,

29. See United Kingdom, Cabinet Office, *The Cabinet Manual*, 1st Edition, October 2011 [Cabinet Office].

30. See Blick, *supra* note 8 at 71.

31. United Kingdom, *Fixed-term Parliaments Act 2011*, c 14.

32. See Catherine Haddon, "Cabinet Manual" (18 August 2020), online: *Institute for Government* <www.instituteforgovernment.org.uk/explainers/cabinet-manual>.

33. See UK, HC, Political and Constitutional Reform Committee, *Revising the Cabinet Manual*, *Fifth Report of the Session 2014-2015* (Cm 233, 2015).

34. See Haddon and Haydon Etherington, "Cabinet Manual" at 3 citing UK, Cabinet Office, "The Cabinet Manual: A Guide to the Laws, Conventions and Rules on the Operation of Government" (2011), online (pdf): *Government of United Kingdom* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf>.

the cabinet manual also has a chapter on relations with that institution, as well as other international institutions. In addition, the British cabinet manual still reflects the legal situation that existed when the *Fixed-Term Parliaments Act 2011* was law.[35] Now that the Act has been repealed, the decision not to regularly update the cabinet manual means that its sections on dissolution and government formation no longer reflect contemporary constitutional realities.

Canada produced an expansive cabinet manual for internal use in the 1960s. Titled the *Manual of Official Procedure of the Government of Canada*, the manual was prepared by the Privy Council Office as a consolidated set of references and precedents for ministers and officials. The manual was similar to internal documents prepared for British ministers in the twentieth century.[36] Unfortunately, it was not kept up to date. Although it still contains useful information and demonstrates how expansive codification of the political constitution could potentially be, it is no longer considered an authoritative account of the rules or relevant precedents.[37]

Instead of producing a formal cabinet manual, the Canadian government has published comparable, but not complete, official guidance documents. The latest of these, *Open and Accountable Government*, was last updated in 2015.[38] This wide-ranging document covers the machinery of government, guidelines for exempt staff, the roles and responsibilities of ministers and deputy ministers, and other topics.[39] Yet, there are important pieces missing from these documents, including an outline of the conventions surrounding government formation and votes of no confidence, a description of the circumstances in which federal decisions may require provincial consultation or consent, and a discussion of how the *Charter*, Aboriginal and Treaty rights, and the Honour of the Crown influence government decision-making and the legislative process. Equally importantly, these documents were drafted by the Privy Council Office without the involvement or scrutiny of parliamentarians.

In addition to *Open and Accountable Government*, the Canadian government has published guidelines for the application of the caretaker convention, an overview of the origins of responsible government and how it evolved in Canada, and a policy on the tabling on treaties in Parliament. While these

35. *Fixed-term Parliaments Act 2011*, *supra* note 31.

36. See Bowden & MacDonald, "Cabinet Manuals", *supra* note 21 at 184–86.

37. See Memorandum from Joe Wild to Rachel Curran, "Access to Information Requests for the Manual of Official Procedure of the Government of Canada", Access to Information number A-2011-00196/AR.

38. Canada, Privy Council Office, *Open and Accountable Government*, 2015.

39. See Prime Minister of Canada, "Open and Accountable Government" (2015), online: *Government of Canada* <pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government>.

documents represent a laudable effort to codify aspects of the political constitution at the federal level in Canada, they are partial, executive-centric and have not been updated with sufficient regularity. Indeed, while the caretaker convention guidelines are occasionally updated to better reflect current practice, *Open and Accountable Government* has not been revised since 2015. Since that time, there has been significant controversy surrounding the relationship between the Attorney General and cabinet,[40] a series of stand-offs between parliamentary committees and the executive regarding witnesses and the production of documents,[41] and a landmark Supreme Court of Canada ruling about the honour of the Crown and the legislative process.[42] Based on the experience of the other core Westminster states, there is a strong case to be made in favour of codifying a broader set of political rules, engaging in meaningful consultations with the legislature in doing so and committing to regular updates.

A. Calls for a Canadian Cabinet Manual

Cabinet manuals are an important starting point in the discussion about codifying the political constitution for another reason: they have tended to be the type of document that supporters of greater codification have focused on. Canadian scholars and political observers have argued in favour of a cabinet manual for over a decade. The initial impetus for this push was the 2008 prorogation controversy. At issue there was the Governor General's power to refuse the Prime Minister's advice to prorogue Parliament if the government is facing a looming vote of no confidence. Scholars on both sides of the debate argued that the prorogation controversy could have been avoided, or at least better navigated, had there been a cabinet manual.[43]

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40. See Ian Austen, "Corruption Case That Tarnished Trudeau Ends With SNC-Lavalin Guilty Plea" (18 December 2019), online: *New York Times* <www.nytimes.com/2019/12/18/world/canada/snc-lavalin-guilty-trudeau.html>.

41. See Robert Fife & Steven Chase, "Liberals offer deal to end parliamentary stand-off over documents tied to the firing of Winnipeg lab scientists" (2 December 2021), online: *The Globe and Mail* <www.theglobeandmail.com/politics/article-liberals-offer-compromise-to-end-parliamentary-standoff-over-documents/>.

42. See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

43. See Peter Russell, "Codifying Conventions" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) at 233; James WJ Bowden & Nicholas A MacDonald, "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand, and Australia" (2011) 6:2 JPPL 365 [Bowden & MacDonald, "Writing the Unwritten"].

Commentators have also argued that producing a manual would serve an educative function.[44] Political actors, media, and the wider public would benefit from having constitutional rules codified and accessible. Furthermore, public presentation of these rules could dissuade politicians from distorting the constitution for partisan ends. The subtext of these arguments was that an authoritative account of what the constitution requires could also be used to check politicians who offered inaccurate interpretations.

Not all commentators favoured the development of a cabinet manual, however. Some argued that while a manual may be practical for New Zealand and the UK, whose parliaments can effect constitutional change through regular legislation, and where the legislature is supreme over the executive and the courts, the strength of Canada's judiciary as a constitutional arbiter presents a challenge. If a Canadian manual codified constitutional conventions, this could invite the courts to treat them as judicially enforceable.[45] Codifying conventions in an official manual, these authors fear, would increase the likelihood that courts would treat them as being subject to judicial delineation and enforcement.

II. Beyond a Cabinet Manual: Codifying the Canadian Political Constitution

Although they are the primary vehicle for codifying the political constitution, it is important to recognize that cabinet manuals are fundamentally executive documents. This means that they mostly describe the parts of the political constitution that relate to the executive, from the executive's point of view, and with the executive's interests in mind.[46] As the New Zealand cabinet manual acknowledges, it is "an authoritative guide to central government decision making for Ministers, their offices, and those working within government. It is also a primary source of information on New Zealand's constitutional arrangements, as seen through the lens of the executive branch of government".[47]

44. See Russell, "Codifying Conventions", *supra* note 10.

45. See Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference" (2011) 54 SCLR (2d) 117 at 132.

46. See Blick, *supra* note 8 at 114; Anne Twomey, "Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention" in Jason Varuhas & Shona Wilson Stark, eds, *The Frontiers of Public Law* (Oxford, UK: Hart Publishing, 2020) 399 at 412–13 [Twomey, "Peering"].

47. NZ, Department of the Prime Minister and Cabinet, "Cabinet Manual" (2017), online: *Government of New Zealand* <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>.

Cabinet manuals do not aim to capture the political constitution as a whole, or to provide an objective account of what it includes.

Hence, while a cabinet manual has its uses, and while there would be no harm in developing a Canadian equivalent, a guide to the political constitution could do more. It could seek to capture the political constitution as a whole in a joint effort by Parliament and the executive, rather than as part of a process in which the government simply consults parliamentary committees without any obligation to incorporate their perspectives. This type of joint legislative-executive project would involve describing the wider constitutional framework within which Parliament and the executive operates. It would also explain how the two institutions and their members relate to one another and exercise their authority under the constitution. Comparator manuals and existing Canadian documents would serve as useful starting points in this drafting process. As we have noted, however, these documents do not seek to capture the political constitution in its entirety. And as we explain now, moreover, it is important not to circumvent the process of reflecting on what should be included in such a guide by relying too heavily on existing materials.

A. International Benchmarks

Canada can be said to exist in a "parent-child" relationship with the UK and in a "sibling" relationship with both New Zealand and Australia for the purpose of comparison.[48] But there are also important differences between the four constitutional orders. Even before Confederation, British law was received into Canada subject to local conditions.[49] When the *Constitution Act, 1867* declared that Canada's new constitution would be "similar in principle to that of

48. See Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74:3 Ind LJ 75; Nicholas Aroney, "Law and Convention" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) 24 at 30. We recognize the shortcomings of these descriptors, given the multiple sources of constitutional law and politics in Canada, but believe that in the context of a cabinet manual, the basic metaphor remains a useful starting point.

49. See H Patrick Glenn, "Persuasive Authority" (1986) 32:2 McGill LJ 261 at 272; Alexandre Marcotte, "A Question of Law: (Formal) Declarations of Invalidity and the Doctrine of Stare Decisis" (2021) 42 NJCL 1. This colonial manner of conceiving of the authority of British laws in Canada in the pre-Confederation period—that laws were received into territory because those territories were without law—ignores the reality that Indigenous legal orders existed in Canadian territory when the British arrived.

the United Kingdom", the words "in principle" did important work.[50] One reason for this is that the setting in which constitutional conventions operate is quite different in Canada and the UK. As Nicholas Aroney explains

> [I]n the United Kingdom what is fundamentally at stake is the direct, unmediated legal powers of a hereditary monarch and a sovereign parliament, whereas in the former colonies, these original concentrations of executive and legislative power are legally mediated through appointed governors and derivative parliaments.[51]

Rather than being concerned with "control[ling] the 'raw' power of Crown and parliament", Canadian constitutional conventions must be understood in relation to a "fixed political order that the constitution authoritatively establishes as a matter of enforceable law".[52] This means that "the existence, nature and scope of a convention is considered, not only in relation to a long-established set of practices and expectations, but in terms of its relationship to the 'plan' of government instituted by the written constitution".[53]

It is perhaps unsurprising, then, that the political constitutions of the UK, New Zealand, Australia, and Canada have diverged to some degree.[54] For example, James Bowden and Nicholas MacDonald note that the rules that govern what happens when a prime minister dies or resigns are different in Canada than in other Westminster states.[55] One of the core attributes of a guide to the political constitution is that it can be regularly updated to take changes into account. It assumes, in other words, a constitution in a constant state of development. It would be unusual if this evolution followed the same trajectory in the UK, New Zealand, Australia, and Canada.

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50. For an in-depth examination of the meaning of the preamble, see Peter C Oliver, "'A Constitution Similar in Principle to that of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207. See also Peter Oliver, "Constitutional Conventions in the Canadian Courts" (2011), online: *UK Constitutional Law Association* <ukconstitutionallaw.org/2011/11/04/peter-c-oliver-constitutional-conventions-in-the-canadian-courts>.

51. Aroney, *supra* note 48 at 31.

52. *Ibid*.

53. *Ibid*.

54. Bowden & MacDonald, "Writing the Unwritten", *supra* note 43 at 394–97.

55. *Ibid* at 396–97.

There are also important differences between the written Canadian Constitution and the written elements of the UK, Australian, and New Zealand constitutions. There is the obvious fact that Canada's written constitution is codified in a discrete set of documents while the UK's is not, and that some aspects of the constitution that are entrenched in Canada (e.g. the *Charter*) are not entrenched in New Zealand, the United Kingdom, or Australia. There are also differences in the substantive content of the constitution and in the domestic constitutional culture. All of these factors have a bearing on the content of a guide to the political constitution. In writing the political rules of the Canada constitution, then, one should rely on Commonwealth precedents with caution, and only where the circumstances justify it.

B. Types of Rules to Codify

Before considering the subjects that a guide to the political constitution could be expected to cover, it may be useful to outline the *types* of rules and practices it would include. We do so for two reasons. First, while a guide to the political constitution would refer primarily to political rules and practices, some reference to law is inevitable because the Canadian constitution's legal and political aspects are not easily untangled. Second, while the political constitution consists primarily of conventions, a wider range of rules and norms is likely to be relevant in attempting to capture its essence and operation.

We begin with a discussion of the role of law in a guide to the political constitution. In many instances, the written constitution provides the starting point for determining how the constitution structures a particular political decision. Convention, constitutional principles, the constitution's architecture, statutes, and practice provide additional detail or context.[56] Sometimes, a constitutional convention may qualify a legal rule or require political actors to act in a way that is the opposite of what the legal rule seems to prescribe.[57] To refer only to the political rules in such a context would provide an incomplete or even misleading picture of the constitutional framework within which political decisions are made.

To give just one example, the rules that govern prorogation are a mix of written constitutional law, unwritten constitutional law, and constitution

56. Aroney, *supra* note 48 at 28.

57. Geoffrey Marshall, Constitutional Conventions: *The Rules and Forms of Political Accountability* (Oxford: Oxford University Press, 1987) at 210; Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics*, 2d ed (Oxford: Oxford University Press, 2014) at 1 [Heard, *Canadian Constitutional Conventions*]; Aroney, *supra* note 48 at 28.

convention.[58] Section 9 of the *Constitution Act, 1867* vests executive power in the King. This power is exercised by the Governor General on the advice of the King's Privy Council for Canada pursuant to sections 10–12 of the *Constitution Act, 1867*.[59] Letters patent defining the office of the Governor General permit her to exercise all of the powers of the King in Canada, including prorogation.[60] When the Governor General prorogues Parliament, she is exercising a prerogative power recognized by the common law.[61] While the Governor General has full legal authority to prorogue Parliament "on paper", however, constitutional convention requires that she prorogue Parliament only on the advice of the King's Privy Council, and since 1896, on the advice of the Prime Minister alone.[62]

The matter of prorogation is made more complex by the possibility that both the advice given by the Prime Minister and the act of proroguing Parliament itself is constrained by law and not merely recognized by it.[63] Mark Walters has argued that the Prime Minister may not lawfully advise the Governor General to prorogue Parliament in circumstances that would violate constitutional principles, including the rule of law and democracy.[64] Similarly, the Governor General should not exercise her legal power to prorogue Parliament in circumstances that would violate core constitutional principles. As Walters explains:

> [A] prerogative act by the Governor General that is blatantly irrational or undemocratic—the appointment of a Prime Minister on the basis of his or her hair color or religious persuasion, for example, or the proroguing of Parliament upon a flip of a coin or to assist a friend in cabinet—could not be lawful under the terms of . . . the Letters Patent.[65]

58. See Warren Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2009) 27 NJCL 217; Mark D Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 JPPL 133 [Walters, "Conventions of the Constitution"].

59. See Newman, *supra* note 58 at 219.

60. See *ibid* at 219–220; Walters, "Conventions of the Constitution", *supra* note 58 at 142.

61. See Newman, *supra* note 58 at 220–21; Walters, "Conventions of the Constitution", *supra* note 58 at 131.

62. Walters, "Conventions of the Constitution", supra note 58 at 131; Newman, *supra* note 58 at 224; Peter Russell, "The Need for Agreement on Fundamental Conventions of Parliamentary Democracy" (2009) 27 NJCL 205 at 205. Canada, Privy Council Office, *Manual of Official Procedure and Practice*, vol 1 (Ottawa: Privy Council Office, 1968) at 464–466.

63. Walters, "Conventions of the Constitution", *supra* note 58.

64. *Ibid*.

65. *Ibid* at 143. See also Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in*

While there have been no successful legal challenges on this basis to date, these arguments should not be dismissed out of hand.[66] Indeed, as the *R (On the Application of Miller) v Prime Minister; Cherry and Others v Advocate General for Scotland* ("*Miller II*") ruling in the UK demonstrated, Walters' understanding has proved prescient in other Westminster states. There, the Supreme Court of the United Kingdom voided the Prime Minister's advice to prorogue Parliament on the grounds that it violates constitutional principles. While the Supreme Court of the United Kingdom declared that *Miller II* was a "one off", it is not difficult to imagine other circumstances in which a scope and extent test could be applied to limit controversial exercises of the Crown's powers on the advice of a first minister.[67]

The foregoing example also illustrates that different forms of law interact with the political constitution. In addition to the text of the C*onstitution Acts* 1867 and 1982, which includes provisions that are directly related to the subject matter of a guide, such as the Governor General's power to dissolve Parliament and summon the House of Commons, the Canadian constitution includes fundamental unwritten legal principles, such as the rule of law, democracy, federalism, judicial independence, and the protection of minorities.[68] These principles should too find their way into any guide, such as in framing the setting in which government formation and decision-making take place, and in describing judicial independence. Similarly, the Supreme Court of Canada has stated that Canada's constitution has a specific architecture.[69] This architecture establishes boundaries between institutions and office, and vests constitutional meaning in the way they operate. Were a guide to the political constitution to

Westminster Systems (Cambridge: Cambridge University Press, 2018) at 11, 12: "The head of state is obliged to act in a manner that is in accordance with the law. He or she is not obliged to act upon ministerial advice that requires the head of state to breach the law or the Constitution."

66. *Democracy Watch v Prime Minister*, 2022 FC 329 [*Democracy Watch*]; *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 5 [*Conacher*].

67. *R (On the Application of Miller) v Prime Minister; Cherry and Others v Advocate General for Scotland*, [2019] UKSC 41 at para 1 [*Miller II*].

68. See *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1; *Ref re Remuneration of Judges of the Prov Court of PEI*; *Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, 158 DLR (4th) 577 [*Provincial Judges Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*Toronto*]; Bowden & MacDonald, "Writing the Unwritten", *supra* note 54 at 368–69.

69. See *Reference re Senate Reform*, 2014 SCC 32; Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67 SCLR (2d) 221.

include a discussion of how senators are appointed, for instance, it would need to explain how the Senate and the traditional appointments process for senators fits within Canada's constitutional architecture as the Supreme Court of Canada described it in the *Senate Reform Reference*.[70]

In the same vein, statutes that affect matters found in the guide, including the life of a parliament and ministerial ethics, would need to be discussed, as would the exercise of authorities that are sourced in the Crown prerogative (as recognized by the common law), notably prorogation and ministerial appointments. The scope of prerogative authority pertaining to foreign, intelligence, and defence affairs could be defined in a guide as well, since these matters are scrutinized by Canada's National Security and Intelligence Committee of Parliamentarians.[71] International law could also be expected to be referred to, notably with respect to Canada's obligations under key treaties and agreements (such as the *United Nations Declaration on the Rights of Indigenous Peoples*),[72] the way that provinces are engaged in the treaty process, and the steps to be followed to withdraw Canada from international treaties and agreements.[73]

A guide to the political constitution would thus describe how law interacts with the constitution's political rules to shape political decision-making and the functions of Parliament and parliamentarians. Of the unwritten political rules, conventions are the most important. Conventions ensure that constitutional principles are interwoven into the exercise of power.[74] They also provide the bonding agent that holds Canada's constitutional architecture together. For instance, the confidence convention holds that the governing cabinet should hold the confidence of the House of Commons or be seeking to regain it. Since the House of Commons is elected and the cabinet appointed, this convention embeds the democratic principle into government formation and the exercise of executive authority. Another example of how conventions hold the constitution's architecture together is found in the relationship between the two houses of Parliament. Convention holds that the appointed Senate should give way to the will of the elected House of Commons as part of the legislative

70. See *ibid*.

71. See Canada, National Security and Intelligence Committee of Parliamentarians, *Annual Report 2018*, (Ottawa: NSICOP, 2019); Canada National Security and Intelligence Committee of Parliamentarians, S*pecial Report on the Collection, Use, Retention, and Dissemination of Information on Canadians in the Context of the Department of National Defence and Canadian Armed Forces Defence Intelligence Activities*, (Ottawa, NSICOP, 2020).

72. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

73. Andrew Blick & Peter Hennessy, *The Hidden Wiring Emerges: The Cabinet Manual and the Working of the British Constitution* (London: Institute for Public Policy Research, 2011) at 24.

74. See Heard, *Canadian Constitutional Conventions*, *supra* note 57.

process. Although the Senate is the appointed upper house, it must defer to the democratically elected lower house when legislating.[75] It is in clarifying and defining these conventional parts of the constitution that a guide would be most useful and important.

Conventions are not the only unwritten aspects of the constitution and government, however. Practices lack the binding power of convention but still influence how institutions interact and how power is exercised.[76] They are behaviours that political actors have decided to adopt, but that have not attained the constitutional status of veritable conventions.[77] For instance, the tabling of treaties before Parliament prior to ratification is a practice sourced in an executive policy, rather than a convention. Similarly, a practice of holding House of Commons votes on military deployments has been observed with greater regularity since 2006, but these votes are not binding, nor has a convention developed such that the lower house's approval is required to dispatch the armed forces on operations overseas. A guide to the political constitution would ideally include these practices, particularly if both the executive and parliamentarians expect that they will solidify into conventions over time. Practices could also be described in a manual as guidelines that should be generally respected, but that can be set aside without raising accusations of unconstitutional behaviour. For example, under the Liberal government of Prime Minister Justin Trudeau, senators have been appointed as independents on the recommendation of an advisory board. Were a future government to abandon this practice and resume appointing party loyalists, it would in our view be erroneous at this stage to say that it was acting unconstitutionally or contrary to convention.

C. Subject Matter of a Guide

We turn now to a description of the broad subject areas that a guide to the political constitution might cover. We offer this list as a starting point for discussion rather than as a definitive account of what a guide would include. Indeed, any attempt to codify the political constitution would need to begin with crafting a methodology and approach for deciding what will and will not be included. The list discussed here was compiled after reviewing codification

75. See *Reference re Senate Reform*, *supra* note 69 at paras 50–63.

76. See Dodek, *supra* note 45 at 126. Blick offers a somewhat different typology of what a constitutional code might consist of. He includes conventions, practices and customs, procedures, constitutional principles, ethical standards, statutory provisions, and common law. Note, however, that he takes a broad view of what constitutes a code, and does not advocate for a guide to the political constitution per se. See Blick, *supra* note 8 at 233.

77. For a broader discussion of practices, see Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms" (2019) 28:3 Const Forum Const 1 [Lagassé, "The Crown and Government Formation"].

efforts in Canada and other Westminster states. We also reflected on the subjects that a guide to the political constitution might be expected to cover, and considered whether there are aspects of the political constitution that would benefit from modernization or further development. As we explain below, writing the political constitution is an ambitious project that would benefit from the input and expertise of a range of stakeholders. These stakeholders would no doubt each have their own views about what a guide should include. At the same time, it is possible to identify a list of essential subjects that a guide to political constitution should cover, as well as topics that deserve more attention from political actors than they have received to date.

In our view, a guide to the political constitution would include several chapters dealing with the executive decision-making, including chapters on (1) the Crown, Governor General, and Governor-in-Council; (2) elections, government formation, and responsible government; (3) the Prime Minister and cabinet; (4) cabinet decision-making and the Privy Council Office; (5) ministers and the public service, including during caretaker periods; and (6) the Attorney General and prosecutorial independence. We would also include chapters on (7) the relationship between the executive and Parliament, with a particular focus on the executive's accountability to the legislature and what the houses of Parliament and their committees can demand from the government under the auspices of parliamentary privilege; (8) the legislative process, including considerations related to the honour of the Crown and the *Charter*, including use of the notwithstanding clause and how parliamentarians should engage in constructive dialogue with the judiciary; (9) the Senate and the relationship between the upper and lower houses; (10) executive-legislative relations as they pertain to defence, intelligence, and international affairs; and (11) a chapter on federalism and intergovernmental relations. Still, other chapters might touch on the roles of officers of Parliament and the responsibilities of the government toward them, ethical and professional standards for parliamentarians, and the use of Indigenous languages and the introduction of Indigenous practices and legal knowledges within Parliament and the executive.

Open and Accountable Government addresses some of these areas, but not all.[78] Nor do Canada's other guides touch on all of these subjects. This list also extends beyond what one finds in other Westminster states, though Canada need not limit itself to what other jurisdictions have done. That said, Australia and the UK's experiences highlight the value of including a discussion of relations with other levels of government, while both the UK and New Zealand's experiences demonstrate the value of clearly articulating the conventions and practices that surround government formation. The Senate, the relationship between Indigenous peoples and the Canadian state, and political actors' responsibility under the *Charter* are issues that merit particular attention in Canada today. Involving parliamentarians in the codification of the rules,

78. Open and Accountable Government, *supra* note 38.

practices, and norms that currently surround these questions is especially worthwhile, particularly in light of the more regular election of minority parliaments and calls for less executive dominance of the legislature.[79]

III. Anticipated Challenges and Questions

Drafting a guide to the political constitution is an ambitious project. As with any project of this magnitude, it is likely to encounter challenges and prompt questions. Some of these questions might also be understood as objections to the project of writing the political constitution. In this section, we examine these challenges and questions and explain why we do not believe them to be insurmountable. Indeed, identifying them and explaining how they can be addressed serves to demonstrate the value of such a project.

One basic issue in drafting a guide to the political constitution is deciding what to include.[80] As we have explained, a guide to the political constitution would go beyond a cabinet manual by seeking to codify the political constitution as a whole rather than just the rules that pertain to cabinet decision-making. This is a large and complex body of rules and practices, about which there are varying degrees of consensus. To reduce these rules to writing would be a formidable task, particularly in a political environment in which cooperation across party lines is generally not rewarded or perhaps even possible. This would necessarily be an iterative process with fits and starts. It may not get very far at first, but few efforts to achieve constitutional reform do initially. Change must begin somewhere, regardless of how unlikely it is to succeed.

There is also the question of the level of detail. Drafters must strike a balance between comprehensiveness and accessibility.[81] If a guide is too long and complex, it is unlikely to be used as a reference by non-experts.[82] If it is too short, it will fail to achieve the goal of providing predictability and accountability. In Canada and the comparator jurisdictions we have discussed, the government has balanced comprehensiveness and accessibility by stating the relevant rules at a relatively high level of generality, and producing separate, more detailed documents for specific contexts. Producing a comprehensive guide to the political constitution would in no way prevent or detract from the publication of more specific documents for specialized audiences. As noted, the

79. See Peter Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Edmond Publishing, 2008).

80. See generally Bowden & MacDonald, "Writing the Unwritten", *supra* note 43.

81. See generally Russell, "Codifying Conventions", *supra* note 10 at 246; Alford, *supra* note 10.

82. See Bowden & MacDonald, "Cabinet Manuals", *supra* note 21 at 185. This is one of the criticisms mounted against the 1968 Manual of Official Procedure and Practice.

exercise would need to begin with a discussion of approach, methodology, and intended audience.

Drafters must also decide how to present conventions and other rules whose scope is the subject of legitimate debate. One option is to acknowledge that the precise contours of a convention are disputed. The alternative is simply to articulate the dominant interpretation of the convention. The New Zealand cabinet manual records the executive's interpretation of particular conventions. The UK manual "sometimes . . . recognises the existence of controversy, but at other times it advances views that are contested yet does not acknowledge their disputed nature."[83] The government justifies this approach on the grounds that "the Cabinet Manual is not binding and others are entitled to take a different view on the operation and extent of a particular convention".[84] It is perhaps to be expected that a cabinet manual will express the executive's view of a convention. However, it would be important for a guide to the political constitution not to make a convention appear more settled than it actually is.[85] In circumstances in which the practice does not all point in a single direction, or there is no consensus on the contours of a convention, it is important for a guide to acknowledge that the position taken on a convention is just that—an opinion that has been arrived following reflection and an examination of the precedents.

A second risk is that the process of writing the political constitution would be executive dominated. This risk is a real one, given the executive's general dominance over both law and politics in the Canadian constitutional order.[86] To be effective, the process of drafting a guide to the political constitution would need to be a collaborative process between the executive and parliamentarians.[87] This is not impossible to imagine; Blick notes that there are examples in the UK of "ownership and production of a document [being] shared between more than one institution".[88] There are ways of managing the process that would

83. Andrew Blick, "The Cabinet Manual and the Codification of Conventions," Parliamentary Affairs, volume 67, issue 1 (2014), pp. 191-208 at 203

84. UK, HC, *Government Response to the House of Lords Constitution Committee, Political and Constitutional Reform Committee and Public Administration Select Committee on the Cabinet Manual Committee Reports of Session 2010-12* (Cm 8213, 2011) at 12-13.

85. For an argument that the version of a convention presented in a cabinet manual contributes to its authoritativeness, see Duncan, *supra* note 13 at 751.

86. See generally Vanessa MacDonnell, "Theorizing about the Executive in the Modern State" (2023) 21:1 Intl J Constutional L [forthcoming in 2023].

87. See generally Blick, *supra* note 8 at 114: "Who owns these texts and how they go about drafting them is important . . . [C]odes can potentially have an impact on conventions. Those who draft these texts have the chance to take the initiative in shaping the constitutional environment within which they operate, perhaps in ways that suit their institutional interests."

88. *Ibid*.

reduce the risk of executive dominance, including ensuring that the process is led by a committee with substantial cross-party representation rather than by the government alone. A joint committee of both houses of Parliament could potentially serve to reduce the paralysis and dysfunction that partisan politics can breed. Thinking about the support structures for this initiative is also important, given that they can sometimes determine outcomes. Government lawyers and historians have substantial expertise in matters relating to the political constitution, and this expertise should be drawn upon as part of the process of drafting a guide.[89] Outside expertise could also help prevent executive dominance. For example, the UK House of Lords Constitution Committee is served by expert legal advisers (typically law professors) who provide independent legal advice to the committee on constitutional matters. Legal advisers from Canada's Senate, House of Commons, and Library of Parliament could also provide support.

There is also a risk of apathy, or perhaps lack of time. As David Feldman has explained, members of Parliament have a range of duties, only some of which include their parliamentary functions.[90] For this type of initiative to be successful, parliamentarians would need to be actively engaged in the process. There has been a high degree of engagement at other moments of constitutional significance, such as in the process leading to the patriation of the Constitution and in connection with the negotiations at Meech Lake and Charlottetown.[91] Writing the political constitution would provide parliamentarians with a unique opportunity to embody a sense of responsibility for the constitution, but they cannot approach the process with apathy or disinterest. Thankfully, there are a number of Canadian parliamentarians from both sides of the aisle, such as Liberal MP Nathan Erskine-Smith and Conservative MP Michael Chong, who have demonstrated a clear interest in these questions and a willingness to advance the interests of Parliament as an institution in its own right.[92]

Two other risks are discussed in the literature on cabinet manuals that would arguably apply in the context of a guide to the political constitution as well. The first is that the process of writing the political constitution would contribute to its "ossification".[93] While the concern for ossification is not unfounded, there

89. See generally *ibid* at 19–20.

90. See David Feldman, "Parliamentary Scrutiny of Legislation and Human Rights" (2002) Public L 323 at 327.

91. See generally Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1993); Carissima Mathen et al, *Canadian Constitutional Law: Cases and Materials*, 6th ed (Toronto: Emond, 2022), ch 16.

92. See Althia Raj, "Parliament's Top Rebel Explains Why It's Healthy to Dissent" (6 March 2020), online (podcast): *Follow-up With Althia Raj* <podcast.app/parliaments-top-rebel-explains-why-its-healthy-to-dissent-e88661790>; Nate Erksine-Smith, "Uncommons with Nate Erksine-Smtih," online (podcast): *Uncommons* <uncommons.ca>.

93. Blick, *supra* note 8 at 199. See generally Aroney, *supra* note 48 at 27.

are also practical ways of mitigating this concern. In the UK, the cabinet manual, which was first published in 2011, has never been updated.[94] By contrast, the New Zealand Cabinet Manual is routinely updated.[95] This suggests that ossification is a risk, but that it can be mitigated with a clear plan for reviewing and updating the guide.[96]

A final concern is the risk of legalization. The concern here is that codifying the constitution's political rules might encourage courts to enforce them in a way they have been unwilling to do to date. We are not convinced that adopting a guide to the political constitution would result in the legalization of the political constitution. Indeed, as we explain further below, codification is at least as likely to have the opposite effect—that is, to preserve the political constitution against incursions by the courts.[97]

IV. Encouraging Political Responsibility for the Constitution

One advantage of a guide to the political constitution is that it would provide political actors with an opportunity to demonstrate their responsibility for the constitution. Indeed, the decision to embrace the idea of a guide, to participate actively in its drafting, and to update it regularly would be a positive development for the health of Canada's democracy. Having political actors take on the responsibility of articulating and demanding respect for the political constitution would decrease the chances of courts intervening in their affairs. A collaborative effort between the legislature and the executive to prepare the guide, and a clear statement that it represents an effort by political actors to regulate their own constitutional affairs, would signal that interpretation of the guide belongs with the members of those branches. Moreover, if a guide to the political constitution helps the political constitution operate with less discord

94. Political and Constitutional Reform Committee, *supra* note 33 at 3, 7; *Miller II*, *supra* note 67.

95. See Political and Constitutional Reform Committee, *supra* note 33 at 9.

96. For an argument that the "multi-faceted, multi-functional nature" of conventions renders them ill suited to codification, see CJG Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions" (1987) 7:3 Oxford J Leg Stud 369.

97. See Macfarlane, *supra* note 9; Leonid Sirota, "Immuring Dicey's Ghost: The Senate Reform Reference and Constitutional Conventions" (2020) 52:1 Ottawa L Rev 313; Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68:4 UTLJ 661.

and fewer conflicts, there would be fewer reasons to call upon the courts. To advance each of these outcomes, however, a guide would need to be seen and accepted as authoritative, both by political actors and the courts.[98]

Before elaborating on this argument, we make one further point. A guide or codification cannot be expected to resolve crises once they are underway. If partisan disagreement and constitutional hardball[99] are at play, a guide to the political constitution, on its own, is unlikely to resolve the dispute. Rather, these documents are likely to be interpreted strategically by politicians to support their positions. For instance, the *Standing Orders of the British House of Commons* became the subject of fierce debate in the 2019 Brexit confrontation, despite having been relatively uncontroversial in the past.[100] The existence of a cabinet manual did not stop the September 2019 prorogation of the Parliament of the United Kingdom from becoming a constitutional crisis, either.[101] In Canada, official guidelines regarding the Attorney General's prosecutorial independence did not prevent the Attorney General and the Prime Minister from coming to differing interpretations of the Shawcross Doctrine, leading to a significant controversy in the first half of 2019.

Rather than looking to a guide as a means of diffusing constitutional crises that have already exploded, a more modest but still fruitful approach is to see the preparation of these documents as a means of avoiding crises before they happen.[102] The very process of involving political actors in the process of discussing the scope, content, and application of the political constitution could strengthen its deliberative and democratic elements. Of course, for the preparation of a guide to have this effect, it would need to be regularly revised and updated to involve new cohorts of parliamentarians, ministers, and senior officials. While it may not be practical or realistic to revise the guide in each new parliament, making this process a regular part of the political process would

98. For a discussion of the authoritativeness of the New Zealand cabinet manual, see Duncan, *supra* note 13.

99. See Mark V Tushnet, "Constitutional Hardball" (2004) 37:2 John Marshall L Rev 523. Tushnet defines constitutional hardball as "political claims and practices—legislative and executive initiatives—that are without much question within the bounds of constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings".

100. See Joe Marshall, "Emergency debates in parliament" (30 August 2019), online: *Institute for Government* <www.instituteforgovernment.org.uk/explainers/emergency-debates>.

101. See UK, *The Prorogation Dispute of 2019: one year on* (Briefing Paper No 9006) by Adam Cygan & Graeme Cowie (London, UK: House of Commons Library, 2020).

102. See Twomey, "Peering", *supra* note 46 at 413.

bring several benefits. It would compel political actors to regularly re-engage with the political rules of the constitution, allowing them to be reaffirmed, revised, truncated, or expanded. It would make political actors responsible for the codification of central tenets of the political constitution and leave a record of their discussions and intent when changes are made. Parliamentary study of the guide would also allow other stakeholders, such as academics and advocates, to share their expertise and aspirations for a guide. Ideally, it would demand that political actors express a shared commitment to the rules and norms that underpin Canada's constitutional order, while highlighting where disagreements and uncertainty remain. This would be particularly valuable in the aftermath of a constitutional crisis, when political actors would have to confront where a breakdown occurred and how similar crises might be prevented in the future.

Most importantly, though, these deliberations could remind political actors that they are the constituent authority behind critical aspects of the constitution, notably those that govern how institutions interact and exercise their power. In a Canadian context, especially, where the executive dominates the House of Commons and party discipline restricts the independence of backbenchers, members of Parliament can feel as if they are bystanders to the evolution of their own institution and role. Without exaggerating how a guide might change this dynamic, involving parliamentarians more directly in the formulation and codification of the political rules of the Canadian constitution would be one means of addressing this disconnect.

A. Use by the Executive

The UK, New Zealand, and Australian experiences provide some sense of how the executive might treat a guide in practice. In New Zealand, several factors have contributed to the cabinet manual being considered authoritative. One is the fact that it has now been in existence for more than twenty years. Additionally, as Grant Duncan explains, "it has been signed off and updated by successive governments as the 'operating manual': it's been recognized and cited by members on all sides of the House of Representatives. It has therefore cross-party recognition and political legitimacy."[103] Its force as a document containing rules that must be followed has thus been strengthened by the ritual of new governments revising and adopting the manual. Australian governments revise the cabinet handbook as well, ensuring that the documents are seen as up-to-date and representative of current practices and expectations. The United Kingdom manual has been around for less time and has never been revised, but it continues to be referenced and treated as authoritative.

103. UK, "The Cabinet Manual", *supra* note 34 at 5.

Within the executive, a Canadian guide to the political constitution would hopefully be treated as prima facie authoritative by ministers and public servants. We imagine that a guide would bind in the same way existing guides for ethical conduct for ministers and political staff are considered binding. One would expect both political and bureaucratic advisers of government to warn politicians about the potential negative implications of being seen to publicly flout the rules prescribed therein.[104]

Of course, as noted above, there is no guarantee that the guide would prevail in a future crisis, especially if there is something to gain by reinterpreting constitutional rules for partisan advantage.[105] The willingness of governments to push the constitutional envelope and engage in hardball tactics is well known. It is difficult to know how much of a difference a guide to the political constitution would make in the political calculus about whether to game the constitution. An additional complication is the nature of political rules themselves. It is not uncommon for politicians to downplay the authoritativeness of constitutional conventions generally, or the authoritativeness of a particular convention, where it suits them, on the grounds that conventions are fluid in character. In this respect, they are not wrong.

For this reason, a guide's value in a live crisis is limited. But to reiterate, expecting a guide to solve these crises is to set the bar too high. Instead, the question is whether a guide can discourage such crises from occurring in the first place, whether the process of crafting and updating it can inculcate a greater respect for the rules at the source, and whether its publication can raise the reputational costs of being seen to act contrary to its commitments. Within the executive in particular, a guide would give more ammunition to senior officials who might seek to discourage ministers and their political staff from acting inappropriately. As with any preventative measure, success is measured by things not occurring. In that sense, the deterrent effect of a guide would be difficult to identify in real time or with a high degree of certainty. Yet, it would be implausible to suggest that a guide would not induce a preventive effect, especially if it is a public document that political actors are understood to endorse and accept.

B. Use by Parliamentarians

A guide to the political constitution would assist parliamentarians in a few ways. First, it would provide greater clarity about conventions, practices, and norms. In this way, it would complement parliamentary publications, such as

104. See *ibid* at 6.

105. On this phenomenon, see generally Twomey, "Peering", *supra* note 46 at 401–02.

House of Commons Procedure and Practice and the standing orders of the houses. Depending on the content of the guide, it could also be used to address contentious matters that have arisen recently, such as the relationship between parliamentary privilege, national security, and cabinet confidence. A guide could also provide a degree of agreement between the executive and legislature about current practice and protocol, such as who can and should be called to testify before parliamentary committees. A guide could also address areas where expectations are unclear, such as what counts as a vote of no confidence, how many times the Senate can send legislative amendments back to the House of Commons on a single bill before deferring to the will of the elected house, and the degree of answerability of ministers before the houses.

Another use for a guide by parliamentarians would be to enhance accountability.[106] Holding the government to account is a primary constitutional function of parliamentarians. The legislature exercises this function in several ways, but one area in which it has been inconsistent is in monitoring the executive's adherence to constitutional conventions and the political constitution generally. A guide would facilitate these efforts, since it would provide a statement of the core constitutional rules that the executive should respect. Moreover, having parliamentarians involved in reviewing and debating the guide could provide additional weight to these accountability efforts, since there would be a record of parliamentary deliberations about particular rules and how they should be applied. The more parliamentarians are involved in discussing and debating how the rules should be interpreted, the greater confidence they can have in arguing that the executive has failed to adhere to them. This would also add to a guide's deterrent effect.

C. Use by Courts

Worries that a guide to the political constitution would further empower the courts highlight the fact that the debate over the codification of constitutional rules is a subset of the debate over the relative virtues of political and legal constitutionalism in Westminster states. In that context, a guide can be seen either as a means of reinforcing and upholding the political constitution or as a first step toward establishing a firmer legal foundation for those rules.

Although codifying conventions might invite the courts to enforce them, it is more likely that doing so would encourage judicial respect of political solutions to political problems. There is little evidence that the courts have an

106. See Blick, *supra* note 8, ch 8.

appetite for revisiting the justiciability of the political constitution. Though they have been willing to recognize the existence of constitutional conventions, they have consistently refused to enforce them[107] or any other part of the political constitution.[108] While some scholars have suggested that the *Senate Reform Reference* may have indirectly legalized conventions by treating the constitution's architecture (of which they say constitutional conventions are a part) as fully legal and subject to the Part V amending formula, the Supreme Court of Canada did not explicitly treat conventions in this way, and it seems unlikely that this was their intent.[109] Were the issue to come before the Supreme Court of Canada directly, there is no evident reason to believe that conventions would be treated as legal. Indeed, in light of the Supreme Court of Canada's recent clarification that unwritten principles should not be used to invalidate legislation,[110] it would be odd for the Supreme Court of Canada to begin to enforce the unwritten political rules of the constitution. For these reasons, writing the political constitution can only contribute to reinforcing the courts' general reluctance to meddle with the political constitution.

There may be circumstances in which an aspect of the political constitution is relevant to a dispute but not directly in issue. In that type of situation, the court is not being asked to enforce a convention or other political rule, but rather is being asked to take it into account in deciding a matter it is otherwise competent to hear. Where this situation presents itself, there is good reason to think that courts would refer to a guide to the political constitution.[111] The same can be said of situations in which the court is asked to recognize the existence of a convention. Recognizing that a practice has crystallized into a convention can be a significant step, and it is a step that the executive and the legislature can influence through the adoption of a guide to the political constitution.

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107. See *Patriation Reference*, *supra* note 2; *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 82 DLR (4th) 321; *Alani v Canada (Prime Minister)*, 2015 FC 649 at paras 25, 28 [*Alani*]; *Pelletier v Canada (Attorney General)*, 2008 FCA 1 at para 18; *Leblanc v Canada*, (1991) 80 DLR (4th) 641, 3 OR (3d) 429 (ONCA).

108. See *Democracy Watch*, *supra* note 66; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40; *Galati v Canada (Governor General)*, 2015 FC 91; *Alani*, *supra* note 107; *Conacher*, *supra* note 66; *Reference re Canada Assistance Plan (Camada)*, [1991] 2 SCR 525, 83 DLR (4th) 297.

109. See Macfarlane, *supra* note 9; Sirota, *supra* note 97; Scholtz, *supra* note 97.

110. See *Toronto*, *supra* note 68.

111. See Twomey, "Peering", *supra* note 46 at 419.

D. Use in Modernization

As we have mentioned, the process of drafting a guide would also provide political actors in both the legislature and executive with an opportunity to modernize and record certain aspects of its practices, including federal-provincial relations and the Crown-Indigenous relationship, which are central to the process of governing but whose inclusion in the political constitution is not always sufficiently considered. Although officials and politicians are quick to point out that codification efforts record rather than create rules, the matter is not so clear cut, particularly for a country still working out how to reconcile its British constitutional heritage with a written constitution, the realities of federalism, and co-existing sovereign Indigenous constitutional orders.[112] Harnessing the process of drafting a guide to the political constitution to modernize certain aspects of Canadian constitutionalism would take the project beyond the realm of straightforward codification. However, we would argue, as others have, that straightforward codification is an illusion.[113] The political constitution is not static. As Anne Twomey explains, "changes in laws and constitutional arrangements will demand the creation of new conventions that are not backed by practice".[114] In other circumstances, "precedents [are] 'hopelessly outdated' or 'are [simply] non-existent for the most problematic of constitutional crises as novel circumstances can be at play".[115] Modernization need not, therefore, be regarded as a radical project.

We imagine that a modernized chapter on federalism would describe the convention of provincial representation in cabinet.[116] It would also discuss the practice of executive federalism, meaning the process by which federal and provincial first ministers make decisions on issues of importance to the federation.[117] It would set out the mechanics of negotiating, concluding, and amending inter-governmental agreements between the federal government and

112. See Cabinet Office, *supra* note 29 at V; Rebecca Kitteridge, "The Cabinet Manual: Evolution with Time" (Paper delivered at the 8th Annual Public Law Forum, 20–21 March 2006), quoted in Andrew Blick, "The Cabinet Manual and the Codification of Conventions" (2014) 67 Parliamentary Affairs 191 at 202–03. For an argument that the UK and New Zealand cabinet manuals go beyond recording conventions, see Blick, *ibid* at 196; Duncan, *supra* note 13 at 749.

113. See Twomey, "Peering", *supra* note 46.

114. *Ibid* at 422.

115. *Ibid*, quoting Andrew Heard, "Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada" (2015) 38:2 Dublin ULJ 331 at 355 [Heard, "Rule of Law"].

116. See Heard, *Canadian Constitutional Conventions*, *supra* note 57 at 162.

117. See André Lecours et al, "Fiscal Federalism in Canada" [forthcoming in 2023].

the provinces,[118] the role of consultation and consent in making decisions in areas of shared jurisdiction,[119] the constraints the division of powers places on federal law-making, and the unique position of Quebec. A chapter on the relationship between Indigenous peoples and the Crown would discuss the constitutional protection of Aboriginal and Treaty rights and the restraints on state action that flow from this protection: the honour of the Crown and the duty to consult,[120] the *United Nations Declaration on the Rights of Indigenous Peoples Act*, which incorporates the UN declaration into domestic law,[121] the process of negotiating modern treaties with Indigenous peoples, and the nation-to-nation relationship between Canada and Indigenous peoples more broadly.

Parliament's role in international affairs could also be modernized through the process of codifying the political constitution. Currently, the requirements to table treaties before Parliament is contained in an executive policy. While this policy mirrors established practices in Australia, New Zealand, and the UK, it does not bind the executive and could be abandoned by a future government. Indeed, Canadian governments tabled treaties before Parliament from 1926 to the mid-1960s, after which the practice was jettisoned, only to be revived in 2008.[122] Having parliamentarians take a direct role in codifying the tabling of treaties in a joint legislative-executive document would strengthen the existing policy and make it more difficult for a future government to abandon. Similarly, since 2006, governments have asked the House of Commons to vote on international military deployments, notably those involving combat. This practice is inconsistent, however, and it is unclear what criteria are applied when deciding whether or not to consult the House of Commons. A codification of the political constitution could serve to clarify when the House of Commons is consulted and when the executive is not expected to hold a vote. Parliamentarians could also use this process to establish what information

118. See Johanne Poirier, "Une Source Paradoxale du Droit Constitutionnel Canadien: Les Ententes Intergouvernementales" (2009) 1 Revue Québécoise de Droit Constitutionnel 1; Johanne Poirier, "Les Ententes Intergouvernementales et la Gouvernance Fédérale : Aux Confins du Droit et du Non-Droit" in Jean-François Gaudreault-Desbiens & Fabien Gélinas, eds, *Le Fédéralisme dans Tous Ses États : Gouvernance, Identité et Méthodologie* (Brussels: Bruylant, 2005) at 441.

119. See Heard, *Canadian Constitutional Conventions*, *supra* note 57.

120. See Steven Chaplin, "Parliament, the Duty to Consult, and Reconciliation" in Charles Feldman, Geneviève Tellier & David Groves, eds, *Legislatures in Evolution/Les Législatures en Transformation* (Ottawa: University of Ottawa Press, 2022) at 69.

121. SC 2021, c 14.

122. See Philippe Lagassé, "The Constitutional Politics of Parliament's Role in International Policy," in Adam Chapnick & Christopher Kukucha, eds, *The Harper Era in Canadian Foreign Policy: Parliament, Politics, and Canada's Global Posture* (Vancouver: UBC Press, 2016) at 56.

they would expect to receive from the executive regarding international military deployments, including the domestic and international legal basis for the deployment, the expected duration and cost, and the anticipated mission risk.[123]

E. Use by Provinces

Finally, it is important to recognize that a guide to the political constitution would be valuable for Canadian provinces as well. While the political constitution suffers from misunderstanding and political disengagement at the federal level, the situation is arguably worse provincially. A number of recent examples stand out, including the debate that surrounded the Lieutenant Governor's role in refusing a request to dissolve the British Columbia legislature in 2017,[124] the application of the caretaker convention in Ontario during the government transition of 2018,[125] and the appointment of opposition leaders to Cabinet committees in New Brunswick during the COVID-19 pandemic.[126] Provincial legislatures and government lack the expertise and knowledge that allows the federal order to better navigate these questions. A guide to the political constitution would provide the provinces with an important reference point and perhaps allow them to develop their own guides that reflect their particular rules and circumstances. Indeed, if a federal codification initiative prompted the provinces to follow suit, it would benefit the country as a whole and involve provincial political actors in asserting their ownership of the political constitution as well.

Conclusion: Common Normative Foundations

A guide to the political constitution would be an exercise in codification; it would serve to "write the unwritten".[127] But it also serves to highlight the distinction between political and legal rules. Codifying political rules in a guide

123. For a discussion of how Parliament could take on a greater role here, see Philippe Lagassé, "Improving Parliamentary Scrutiny of Defence" (2022) 22:3 Canadian Military J 20 at 20.

124. See Rob Shaw & Richard Zussman, *A Matter of Confidence: The Inside Story of the Political Battle for BC* (Victoria: Heritage House, 2018).

125. See Lagassé, "The Crown and Government Formation", *supra* note 77 at 8.

126. See JP Lewis & Robert Burroughs, "External Shocks and Westminster Executive Governance: New Brunswick's All-Party Cabinet Committee on Covid-19" (2020) 43:3 *Can Parliamentary Rev* 38.

127. Bowden & MacDonald, "Writing the Unwritten", *supra* note 43.

is not the same thing as transforming them into law.[128] Writing down the political rules of the constitution would not lead to a wholly "written constitution" in the sense of one definitive document and may, in fact, forestall it. Indeed, the absence of a written constitution understood in this way partly explains why New Zealand and the UK took the lead on developing cabinet manuals among the four core Westminster states. At the same time, a guide to the political constitution would not deal with political rules alone. Political rules are intertwined with law, just as law always operates in a political environment. Political and legal constitutions are distinct but not separate. They are two parts of a constitutional order, not two types of orders. The Canadian case makes this clearer than most.

As one part of a greater whole, the political constitution necessarily shares normative foundations with the other parts.[129] Yet, since the patriation of the constitution and failed efforts to bring about constitutional amendments in the late 1980s and early 1990s, the task of defining the normative foundation of the Canadian constitutional order has largely fallen to the courts. Political actors have become wary of engaging with the constitution, lest they become embroiled in yet another national debate that has no prospect of success and seems to present threats to national unity. Indeed, when political actors do decide to tackle the constitution, as Prime Minister Stephen Harper did with Senate reform, referring the matter to the Supreme Court of Canada appears to be the path of least resistance, since the highest court will have the final say regardless.[130] Although the political constitution is as much a part of the Canadian constitutional order as the legal components, those who are responsible for shaping and defining it—political actors—are not sufficiently engaged with constitutional questions.

One of our two main arguments for a Canadian guide to the political constitution is that it would bring political actors back into the constitutional conversation. Rather than asking them to address questions that seem intractable and of no immediate benefit, drafting a guide to the political constitution would involve political actors in matters that affect them directly and in which they are meant to be the primary drivers of both continuity and change. The shared normative foundations of the constitution, found in the principles that undergird both the legal and political constitutions, would be strengthened by renewed parliamentary commitment to upholding these principles in their

128. See Duncan, *supra* note 13 at 738.

129. See Bowden & MacDonald, "Writing the Unwritten", *supra* note 43 at 368–69.

130. Alternatively, political actors argue certain changes do not require a constitutional amendment, or that the constitution already permits what is being proposed. See, for example, Canada's approach to the alteration of the rules of royal succession in 2013 and the federal government's reaction to Quebec's French language charter in 2021.

sphere of authority.[131] While it might be argued that today's Canadian political actors lack an interest in shaping the constitution, and that any such exercise would be weighed down by strict party discipline, this situation can only be improved by first involving politicians in constitutional matters. Put simply, political actors must be made responsible for their part of the constitution before they can act responsibly toward it. The process of developing a guide, debating its contents and applications, airing disagreements, and establishing common ground, could help restore parliamentarians' sense of themselves as constitutional actors. While a great deal of effort would be required to change the reality that most members of Parliament see themselves as party members first and parliamentarians second, encouraging them to appreciate their part in shaping and determining the political rules of the constitution would be an important first step.

131. See Heard, "Rule of Law" *supra* note 115; Bowden & MacDonald, "Cabinet Manuals", *supra* note 18; Mark Walters, "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7" (2013) 7 JPPL 37.