# Heard, Andrew. *Canadian Constitutional Conventions*. Toronto: OUP, 1991.

***Thesis and Summary:***

This book provides a description of the most important constitutional conventions in Canada. It covers Canadian Governors-General, Canadian legislatures, Cabinets, Federalism, and Judiciaries. The underlying argument of the book is that Canada’s constitutional laws could not function adequately without a wide variety of unwritten constitutional conventions. In the final chapter, Heard provides a taxonomy of conventions beginning with the most important (“constitutional conventions”) and ending with the least important (“usages”)

***Methodology and Theoretical Perspective***

Beyond the basic argument mentioned above, Heard’s book is largely atheoretical. His methodology is based on extensive secondary scholarship and qualitative primary research.

***Comparison with Other Readings and Contribution to the Literature***

Heard’s goal is to revise the standard understanding of conventions which has grown out of A.V. Dicey’s classic *An Introduction to the Law of the Constitution*. For those outside these specific academic debates, the work is useful primarily because it provides an accessible description of the most important constitutional conventions in Canada.

***Relevant Exam Questions***

This book could be useful for questions about the adaptability or flexibility of the Canadian constitution or parliamentary government. It’s also useful as background for questions about the function of Canada’s major institutions.

***Detailed Notes:***

*Chapter One: The Role and Nature of Conventions*

1 Section 52 of the 1982 *Constitution Act* declares about two dozen British and Canadian statutes and orders-in-council to be our Constitution; but the whole constitution is composed of three elements: the formal constitution, the legal rules relating to the three branches of government, and constitutional conventions

2-3 Two trends today: an attempt to draw a boundary between law and convention; and a propensity to seek legal regulation of rules that are normally governed by convention; if conventions become increasingly justiciable, there is some danger that the democratic nature of constitutional evolution might be eroded

5-10 How to distinguish between law and convention? The common answer is to say that conventions can’t be enforced by the courts and are political in nature; others have claimed that the two are inextricably intertwined; the fact is that conventions *have* been discussed and defined in a number of cases

10-11 How do conventions arise? Two ways: through some practice or through the explicit agreement of the relevant actors;

15 The task of the book: to provide an insight into the nature of the conventional rules at work in the Canadian constitution and what the terms of the conventions actually are

*Chapter Two: Conventions of the Governors’ Powers*

16-17 Some of Canada’s most important conventions ensure that the GG and LGs power is actually exercised in practice by the Prime Minister and Cabinet; the general tenure of the GG is now five years, and the convention dictates that the selection lies with the Prime Minister personally

17-19 On “paper”, the GG’s power is immense, but it is limited by some of the most firmly established conventions: the GG appoints to the Privy Council as PM the leader of the majority party in the House; appoints only those ministers chosen by the PM; only current members of the Privy Council can partake in decision-making process; GG is bound to act on the “advice” of the Cabinet almost always; but the GG may retain some power through its right to “be consulted, to encourage, and to warn”.

19-20 The specific circumstances in which a GG can exercise emergency powers are controversial; particularly during elections or parliaments that have lost confidence (basically related to the power to appoint the PM, since the appointment of the PM is the one act that is not done on formal advice)

22 In the case of minorities, there are two schools of thought: some think that the GG should invite the leader of the largest party to try to form a government and then let the party leaders sort it out; if they can’t sort it out, a new election should be held (there’s an additional complication when the opposition party had less votes than a smaller party, as in 1975 Ontario election): it is crucial in all of this to recognize that the *legislature* ultimately decides who will govern

26 It is worth briefly noting the degree of flexibility that a GG or LG would have in the event of an extreme emergency (such as a bomb in parliament), in which case the conventions would cease to be relevant, in which case the GG could exercise almost total personal judgment

26-28 Dismissal: a governor can dismiss if (1) the government has lost an election but refuses to resign or (2) the government has lost a vote of confidence and refuses to resign; this is really only means in the constitution to prevent a government from clinging to power; governments have been dismissed in Canada due to corruption only twice (Mercier government in Quebec in 1891, BC Government in 1903); there is still great debate over whether the GG can dismiss a government as the guardian of the constitution

29-34 Summoning and dissolution: little controversy that the GG can summon the legislature when they’re delaying or avoiding meeting; as for dissolution, it’s quite controversial because the GG would have to force the PM to agree (and then accept the PM’s “advice”); Ed Schreyer contemplated this during the patriation crisis in the early 1980s

40-44 What about the abuse of GG or LG power? The check here is dismissal (as opposed to the British, who can only resort to forced abdication or the abolition of the monarchy); it’s not clear whether the advice to remove a governor has to come from Cabinet or just the PM; in Canada it’s been the Cabinet, though there are alternative examples elsewhere in the commonwealth; it’s generally assumed that the Queen would have no right to refuse the Cabinet’s recommendation that a new GG be appointed

46-47 Conclusion: conventions are important in the practical use of governors’ extensive legal powers; convention has allowed for an adaptation without the need for constitutional amendment; still, much controversy remains on the prerogative power of the GG in times of crisis; many would argue that the GG has the duty to protect the constitution

*Chapter Two: Cabinet, Ministers, and the Civil Service*

48 The cabinet is barely present in positive law; the principles of individual and collective ministerial responsibility are mostly informal rules

48-50 Cabinet formation: the Cabinet has no specific genesis in law, but it is a committee of the Privy Council (of s.11 of Constitution Act 1867); ministers are first made a member of the PC for life (the PC also contains honorary appointees, such as premiers, opposition leaders, statesmen, judges, and some royals, but only cabinet ministers can participate in the committee known as the Cabinet)

The Cabinet members must be MPs or Senators; in Canada it’s been a convention that they be representative of all of the provinces (exception: PEI) and of both languages

50-52 Responsible government: two general aspects: (1) individual ministerial responsibility for their own departments and personal activities and (2) collective responsibility of Cabinet as a whole

52-62 Individual responsibility usually includes two particular meanings:

1. Informational answerability: members of the legislature can ask questions of the ministers (an oral question period is provided for in the standing orders of the Canadian House of Commons; also provision or written questions); but the minister doesn’t have to respond according to the rules, and there are other rules in place that limit the potential for answerability
2. Culpability: political culpability and legal liability of ministers for actions in their departments; in the past thirty years, academics have disputed the claim that ministers are culpable for everything in their departments; TM Denton claims not to have found a single resignation because of malfeasance by departmental officials; the vast majority of ministerial resignations occur due to morally or legally compromising positions of the minister himself/herself
3. Must also consider bureaucratic neutrality here, which has come under some pressure more recently; the prevalent practice is to respect the anonymity of the officials it the departments, though there are a few examples of ministers throwing officials under the bus

62-74 Collective responsibility of the Cabinet as a whole is at the core of our government: the cabinet is responsible to the monarch, to itself, and to the elected chamber of the legislature (ministers are legally servants of the Crown, and hold office at the governor’s pleasure)

1. Cabinet Solidarity: cabinet must retain a public posture of unanimity and respect the confidentiality of the materials and discussions held in reaching the decisions; ministers present a united face in public and all vote in favour of government policies; in Canada, breaches of solidarity have been rare, and even resignations over disagreement have been quite rare
2. Cabinet confidentiality: state secrets and ministerial disagreement is all kept confidential to allow for free and open discussion (though most cabinet documents are made public after thirty years)
3. Cabinet confidence: most important rule of the parliamentary system is that government must resign when it loses confidence of the legislature; these notions arose from resignations of governments in England between the two Reform Acts of 1832 and 1867; a government must resign if it loses a clearly worded motion of non-confidence; or a matter previously declared to be one of confidence; a defeat on financial matters, pretty much any supply or tax matter (though Pearson’s refusal to resign in 1968 is an exception here)

*Chapter Four: The Legislatures*

78-79 A fundamental principle is the presence of political parties: only through parties does the election of members translate into a cohesive government; this is so important that a method of pairing has long operated so that votes are kept roughly proportionate to the overall party standings (though occasionally the temptation to catch the opponent off-guard is too strong, as in the demise of the Meighen government)

79-82 The whole shape and tenor of Canadian legislatures is forged by the operation of disciplined parties; party deviations are not permitted on matters of confidence; most research has shown that party discipline comes more from peer pressure than from the threat of discipline by the party whip

82-84 The party caucus: each party has regular caucus meetings to discuss party strategy and policy; this is the forum for internal debate; the internal cohesion of parties is achieved without the benefit of any written rule

84-87 Party government and the Charter; there is some debate about the extent to which the Charter applies to the internal workings of parliament; Heard argues that it’s better to keep the internal workings outside of what’s reviewable by the courts

87-99 Relations between the Senate and the House of Commons; there is very little variation in Senate amendments between times when the Senate is controlled by a different party and times when it is not; the size of the government majority is the most significant factor; the Senate therefore seems to paly a role in constraining majority governments; there are no general principles for Senate amendment, except that it should not frustrate the general purpose of the legislation put before it; it is also a convention that the bill presented for royal assent must be the same in both Houses

*Chapter Five: Federalism*

101-05 Reservation and disallowance: until WWII, fairly active use made of reservation and disallowance; in the Trudeau years, disallowance and reservation fell into disuse (Trudeau had concluded that they were obsolete before he even came to office); in the 1980s, academics agreed that reservation and disallowance were basically extinguished (though some, such as Forsey, pointed out that they hadn’t been officially abolished in 1982 Constitution Act)

105-08 Lieutenant-Governors: appointed by GGand subject to instruction by the GG (i.e. federal Cabinet), thus seen after confederation as national officials (in much the same way that the Governor General was an agent of the imperial government); court decisions (such as JCPC decision in 1892) have emphasized that LG is an agent of the Crown and not of the national government (buttressed by decision of Supreme Court in 1848); post-1982 there’s little to suggest subordination of the LG

108-10 Federalism in central institutions: representative cabinet, regional appointments to the supreme court, examples of intrastate federalism in Canada

110-16 Federal provincial conferences and agreements; these FMCs are governed by informal rules and are supplemented by other meetings; more generally, there is a firm expectation that the governments will observe their intergovernmental agreements

*Chapter Six: Judicial Independence*

121-25 Removal of judges: security of a judge’s tenure is the first requirement of an independent judiciary: very few judges have actually been removed; the protection fo legal tenure continues to rest on informal understandings of what constitutes misbehaviour, and these conventions are important in protecting judges

125-27 Judicial immunity; you can’t sue a judge for a wrongly decided case; the judge is still liable for criminal activities and personal wrongs; still, there may be times when judicial testimony would be a good thing

127-30 Third-party iterference: informal rules protect judges from outside pressure – ministers shouldn’t question a judge directly; there are certainly questions here about how judges are to interact with other judges and law clerks

130-34 Limits on activities of judges: can’t engage in public debate on decisions or express personal decisions on major political issues; some exceptions in Canada (such as Thomas Berger’s criticisms of the 1982 patriation” which led Berger ultimately to decide to resign

134-36 Appointment of judges: some provinces have made progress in reducing patronage in judicial appointments process, but more could be done here

*Chapter Seven: The Variety and Character of Conventions*

142-45 There are four interrelated factors that combine to produce distinct types of rules:

1. The importance of the principle lying behind the rule: Canada as self-governing, democratic, responsible, federal
2. Degree of agreement among actors, constitutional observers, and general public about the principle that a rule supports
3. Degree of agreement about the specific terms of the rule; there may be agreement about the general fomulation of a rule or the specifics of a rule
4. How close the rule comes to embodying the principle it supports; is it a primary rule (responsible government, say) or a subsidiary rule which supports one of the primary rules?

145-49 There are also various categories of constitutional rules:

1. Those basic to the constitution, whose violation or alteration would produce significant changes in the operation of the constitution: *fundamental conventions*
2. Those which must be observed but whose specific terms could be altered without drastic changes to the practical operation of the constitution: *meso-conventions*, because they lie alongside fundamental conventions
3. Rules which describe a desirable manner of behaviour but which can be occasionally disregarded without significant impact: *semi-conventions*
4. Proposals of behaviour which lack full acceptance and whose existence may even be hotly contested: *infra-conventions* (e.g. GG’s ability to force an election)
5. Patterns of behaviour that are little more than habit, convenience, or symbolism: *usages*. Some sense of obligation but no sanction if not respected beyond the general pressure of one’s peers.

149-50 What must we ask when classifying conventions: What reason could be given to justify the obligation? If nothing other than tradition, habit, etc. then it’s clearly a *usage*; if something more, it climbs higher

156 If we ignore the interrelationship between law and convention, we’ll overlook the fact that the conventions allow the constitutional laws to function acceptably; the most important conventions depend on a healthy marriage between law and politics