Confidence: How Much is Enough?

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Did Prime Minister Stephen Harper, faced with almost certain defeat in the Commons in December 2008 on a matter of confidence, act unconstitutionally by seeking to prorogue a newly elected parliament that had been sitting for only two weeks? And did Governor General Michaëlle Jean violate the principles of responsible government by granting prorogation? These questions have been the subject of intense debate in the Canadian media and may rank with the King-Byng crisis of 1926 in future academic and legal discussion of the constitution. In my opinion, while the prime minister tested the limits of "responsible government," the Governor General respected precedent and acted appropriately and wisely in her decision.

Let's begin by winding the clock back to the election of 23 January 2006. Following that vote government in Canada changed hands smoothly, efficiently, and promptly – and in accordance with the time-honoured principles of responsible government, which lie at the heart of our constitution. On the night of the election, Prime Minister Paul Martin made known that he would leave office. Though the Liberals had come second in the party standings, no party had won a majority and Martin could have chosen to test his strength in the new Parliament and see if he could carry on in government. But like Prime Minister Louis St. Laurent, who had found himself in similar circumstances after the election of 1957, Martin chose to resign. His decision removed all doubt about what should happen next constitutionally, and cleared the way for the events that followed. On 6 February 2006 Stephen Harper, whose Conservatives had won the largest number of seats (but not a majority), was sworn in as Canada's twenty-second prime minister, a position he has held ever since (the term of a prime minister does not run from election to election, as is sometimes implied in the Canadian media, but from the date of swearing in until the date of resignation: i.e., Stephen Harper is still in his original term). No party represented in the Parliament elected in 2006 questioned the legitimacy of the change of government. After a hard electoral battle, Paul Martin exited the office of prime minister gracefully and decisively and in the process made life simple for Governor General Jean, the guardian of the constitutional order, who was new to her office. Her role after the election of 23 January was to accept the resignation of one government and swear in another in circumstances that were unambiguous. Power changed hands in 2006 without a constitutional ripple in Canada, and the Harper government was able to maintain the confidence of the new House of Commons (i.e., win votes on matters of confidence) thereafter.

This record put Prime Minister Harper clearly in the driver's seat on the crucial matter of dissolution (i.e., determining the timing of the next election). Historically, this has been one of the prime minister's most prized prerogatives — crucial both in keeping discipline in his own ranks and in managing the opposition. Under Canadian practice, if a prime minister has an established record of parliamentary support, his or her advice to the governor general to dissolve is accepted if and when it is offered. This is so whether the government had been defeated in the House of Commons or not. On a critical matter, the prime minister and the prime minister alone offers the crucial advice, which in the normal course of events the governor general accepts. In our flexible system, the Crown has one chief adviser at a time, and the advice of that individual is normally accepted by the governor general (who nevertheless retains an undefined reserve power to deal with extraordinary circumstances). This is a fundamental

constitutional reality and ensures clarity in our system of government. We have one governor general at a time and one prime minister at a time, with the former (though with reserve final authority) acting on the advice of the latter.

Strangely, in 2007 Prime Minister Harper acted to limit his own freedom of manoeuvre in relation to dissolution by pushing through legislation (Bill C-16[1]) to fix election dates in the country (the next vote was scheduled for 19 October 2009). In practice, assuming a minority situation, this legislation seemingly transferred the whip hand to the opposition parties; the government was on an agreed electoral schedule but its opponents could trigger an election by passing a vote of non-confidence. However, the new law, which is a dog's breakfast, also begins with a preamble stating that nothing in its terms alters the existing powers of the governor general. When it came to actually wanting an election, the prime minister was able to get around the legislation by roping the opposition leaders (they foolishly agreed to this) into a consultation procedure leading to dissolution and using the argument that the Parliament elected in 2006 had become dysfunctional. The Governor General granted the request of the Prime Minister to dissolve, and the legitimacy of her action was not challenged by the opposition parties (though the lobby group Democracy Watch eventually started a court action to have the election call declared illegal).

The vote, held on 14 October 2008, produced a mixed result for the governing Conservatives. They increased their number of seats in the House of Commons but were again in a minority position. Following the election, as expected, the government carried on and, again, its right to do so was not challenged by the opposition parties (two of which — the Liberals and the Bloc Québécois — had fewer seats than they had had in the previous Parliament). Obviously, if they had wanted to, the opposition parties could have combined immediately after the election, made known that they would defeat the government at the first opportunity, agreed on a candidate for prime minister, and insisted that Parliament be called together as soon as possible. Such a sequence of events would have resembled what had happened in Ontario in 1985, when, following a provincial election, the Liberals and NDP had made an agreement to oust the governing Conservatives forthwith. If the opposition parties had ganged up at this moment and in this fashion, a change of government, though politically surprising, would have been constitutionally irresistible after 14 October. In fact, nothing of the sort happened and business proceeded as usual, with the new fortieth Parliament being called together for the first time on 19 November. Subsequently, the government established a record of confidence in that Parliament when, on 27 November, the House of Commons approved the motion, as amended, for an address in reply to the Speech from the Throne (this was duly noted at the time by Government House leader Jay Hill). How many confidence votes must a prime minister leading a minority government have under his belt for his advice to dissolve to be accepted by the governor general? There is no written rule about how much is enough but, given the deep convention of the governor general following the lead of the prime minister in a key matter, one confidence win is probably enough. Arguably, following the successful completion of the debate on the address in reply, Prime Minister Harper regained the upper hand with respect to dissolution. As with its acceptance of the prime minister's ad hoc procedure leading to the election call, the opposition parties had let another potentially opportune moment pass.

With everything seemingly on course for Parliament to continue its work and the government to continue governing, matters changed drastically after Finance Minister Jim Flaherty presented an Economic and Fiscal Statement, also on 27 November and immediately *before* approval was given to the address in reply motion, as amended. This offered a lacklustre response to the developing global financial and economic crisis, while announcing that, as an economy measure, the country's political parties would be taken off the public payroll. All of this had the effect of emboldening the opposition parties, which now, finally, had good reason to combine to oust the government. An agreement, announced on 1 December, was hastily made among them to bring down the

government and install a Liberal-NDP coalition with Liberal leader Stéphane Dion as prime minister. Though not part of the coalition, the Bloc Québécois agreed to sustain it in office.

Faced with the previously unimaginable, the Prime Minister turned to the expedient of prorogation to avoid immediate and certain defeat in a confidence vote. His intended course of action was highly controversial across the country. Many took the view that prorogation in current circumstances would violate a basic principle of responsible government (i.e., by preventing MPs from debating and voting on a fundamental issue), was therefore unconstitutional, and should be refused by the Governor General. In practice, at a lengthy meeting with Stephen Harper on 4 December, which riveted national attention on Rideau Hall, the Governor General agreed to prorogue — but on the understanding that Parliament would resume sitting on 26 January 2009. Her action was measured and judicious; it both respected the deep convention of the governor general following the advice of the prime minister and upheld the notion that Parliament does not exist at the sufferance of the government. The Prime Minister got his way — but Parliament would soon be able to test the government in a confidence vote (albeit in different political circumstances). Of course, if Stephen Harper had been refused prorogation on 4 December, he could have advised dissolution. Importantly for Canadian democracy, at the end of an unprecedented series of events, the opposition parties did not challenge the legitimacy of the Governor General's decision. Remarkably, however, there was talk of a campaign against the Governor General by government supporters if she had gone the other way. Any such action would have been reprehensible and poisonous to the constitutional order, which hinges on respect for the neutrality, fairness, impartiality, and discretion of the governor general.

When Parliament resumed sitting in January 2009, a chastened government presented its budget. This was approved, and the proposed coalition faded away. So where are we now constitutionally? If, in the fullness of time, the Harper government is defeated on a matter of confidence, the Prime Minister will have choices: he could resign and, if asked, advise the Governor General to send for someone else to form a government (this is unlikely), or he could request the dissolution of the fortieth Parliament and the calling of another election. Given that the governor general normally acts on the advice of the prime minister and that the government has successfully met the new House of Commons and established a record of support, his request for dissolution would no doubt be granted (the imaginings of opposition coalition hopefuls notwithstanding). In sum, we are back constitutionally to where we were before the 2008 federal election was held.

Since the current period of minority government began in 2004, there has been much loose talk and writing in Canada about the role of the governor general. Practically speaking, her job is to ensure continuity of administration, carry out the ceremonial duties of her office, and avoid bringing the Crown into disrepute. Involvement in party politics (e.g., listening to a host of self-interested advisers and would-be cabinet ministers) would certainly invite disrepute. Happily for the Governor General, this can easily be avoided by applying without fear or favour the simple and time-tested rules of responsible government. These specify a sequence of events that keep the Crown above the political fray, where it belongs. Since the election of 2004 put Paul Martin's Liberal government in a minority position, there has been much chattering in the country about the right to dissolution in a fractured Parliament, but in practice this comes up against an unavoidable reality. For the governor general to refuse dissolution to a prime minister who has successfully governed (i.e., had for a time, however brief, the confidence of the House of Commons) would be both risky and dangerous. Prime Minister Harper has met this test, and his advice on dissolution, whatever the timing, will have to be heeded. Ultimately, the sorting-out of a messy Parliament and political situation is not the responsibility of the governor general, but of the democratic electorate she defends.

Canadians may be of a mind to change the existing rules about the timing of national

elections and the operation of the parliamentary system (especially in minority situations). But unless and until they do, the existing rules apply, and established practice is crystal clear: the governor general accepts the advice given by the prime minister and leaves the final verdict to the electorate, where it rightly belongs. According to her memoirs, Governor General Adrienne Clarkson seems to have had a different view of her position, but her particular understanding of the constitution was never tested. Recently, the claim has also been made that the Governor General should give a public accounting for her constitutional decisions,[2] but this would have its own perils (as would judicial intervention — though there may be activist judges itching to make the interpretation of the prerogative powers of the Crown the last frontier of the *Canadian Charter of Rights and Freedoms*[3]). The governor general is the protector of the constitution, not a political actor. Absent the most exceptional circumstances, her job is to follow precedent, eschew politics, and maintain the legitimacy of her office. This is exactly what Governor General Jean achieved in December 2008 when confronted with the hard choice put to her by a prime minister who had blundered badly and was running for cover.

Notes

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1 *An Act to Amend the Canada Elections Act*, S.C. 2007, c. 10.

2 See for example, Lorne Sossin & Lorraine Weinrib, "Canada's Constitutional Black Box," University of Toronto Faculty Blog, online: <http://utorontolaw.typepad.com/faculty_blog/2008/12/lorne-sossin-and-lorraine-weinrib-canadas-constitutional-black-box.html>.

3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.