

The Governor General's Decision to Prorogue Parliament: A Chronology & Assessment

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We are fortunate that real crises are few and far between in Canadian politics. We have a fundamentally stable system of government, and most political leaders both understand and play by the rules most of the time. As a result, it is something of a shock when a real crisis erupts and fundamental differences unfold over basic constitutional rules. Canada's parliamentary system has been under increasing strain for several years, but matters came to a head in late 2008. While Governor General Michaëlle Jean's controversial decision to grant Prime Minister Stephen Harper's request to prorogue Parliament was the high point of this crisis, there is so much more about this episode that needs to be understood. And it is crucial for us to really understand this affair because the ramifications of the 2008 crisis are profound and enduring. One reason the events erupted so quickly into a crisis is that they dealt with the unwritten rules of the constitution, which are seldom discussed in depth even at the best of times and, as a result, are subject to misinterpretation and misrepresentation in times of conflict. The tension was compounded by the unprecedented nature of much of what transpired. Without clear and easy parallels to similar crises in the past, the public and their advisors in the media were left confused as to what was or was not the proper course of action. Nevertheless, there were clear constitutional principles at play that would have been able to give better direction to the Governor General and the Prime Minister if they had been heeded.

For some, the Governor General did the

right thing in acting on the Prime Minister's advice to prorogue Parliament. She correctly ensured that there would be a cooling off period before a new confidence vote is held, and she prevented hasty actions by opposition parties to hijack Parliament and install themselves in cabinet, when the Conservative Party of Canada had been empowered by the last election to form the government. For others, however, the Governor General inappropriately suspended Parliament and set a dangerous precedent for the future. Now prime ministers can avoid defeat on impending confidence votes simply by proroguing Parliament, only to return months later when they feel they have the situation under better control. The result is a severe blow to the principle of responsible government and Parliament's ability to decide which party or parties has its confidence as the government of the day. Such widely divergent views attest to strongly held beliefs on each side that abuses of power were being perpetrated by the other.

Chronology

The order of events that unfolded is clear, but the significance attached to them might be debated. The 2008 election was held on 14 October and resulted in no one party gaining control of the House of Commons. The Conservative Party won more seats than any of the other parties, 143 of a possible 308, on the strength of almost 38 percent of the vote. This represented a gain of nineteen seats and 1.3 percent of the vote, despite a drop of over 165,000 votes from 2006, because

overall turnout was lower. The Conservatives were twelve votes short of the 155 needed for a majority in the Commons. The Liberal Party of Canada finished second with seventy-seven seats and 26 percent of the vote. This was a loss of twenty-six seats and 4 percentage points in the vote for the Liberals, as well as an absolute loss of over 850,000 votes. The Bloc Québécois lost two seats and a half percentage of the national vote total, ending up with forty-nine seats and 10 percent of the vote. The New Democratic Party (NDP) gained eight seats and just under a percentage point of the vote to finish with thirty-seven seats and just over 18 percent of the vote.¹ The Liberals were widely viewed as the losers in this election, as they won their smallest share of the national vote since Confederation. Liberal Party leader Stéphane Dion announced within days of the election that he would resign as leader, but would stay in office until a leadership convention to be held in May 2009 produced a replacement. Harper remained as Prime Minister, and there was no serious discussion that he should do otherwise. He advised the Governor General to summon Parliament to meet on 17 November. Because the Governor General was on an official tour of Eastern Europe at the time, Chief Justice Beverly McLachlin of the Supreme Court of Canada, in her capacity as Deputy of the Governor General, read the speech from the throne on 18 November. The government's motion in reply to the speech from the throne was debated over the course of the next few days. The Liberals successfully sponsored an amendment that was adopted on 25 November, which read:

and we urge Your Excellency's advisors to respect the results of the election in which more than 60 percent of voters supported Members of Parliament in the opposition;

to bear in mind that people express their wishes as much through the opposition as through the government;

to recognize that Canadians rightfully expect the House of Commons they just elected to function in a less partisan, more constructive and collaborative manner, with the first responsibility for setting a better tone being that of the government which requires the government to be more forthcoming than it has been

up to now; and

to that end, given the crucial nature of the upcoming economic and fiscal update, to provide representatives of opposition parties with a detailed briefing by appropriate senior officials at least three hours in advance of the public presentation of the update, so all Members of Parliament can be properly equipped to deal with the serious economic difficulties confronting Canadians.²

This amendment was not considered to be a test of confidence and debate on the main government motion continued. On the afternoon of Thursday, 27 November, Minister of Finance Jim Flaherty presented an economic statement to the House of Commons. This statement was immediately condemned by the leaders of all three of the opposition parties, who together announced that they would vote against the measures contained in the economic statement. Two principle concerns were the lack of a stimulus plan to address the unfolding global economic problems, and the plan to eliminate the quarterly financial subsidies that political parties receive (based on the number of votes each received in the previous election). Immediately following the speeches on the economic statement, the House voted on the final motion in reply to the speech from the throne, which served as the first substantive test of confidence in the government since Parliament resumed after the October general election; this motion passed on a voice vote.

The government announced that the following Monday, 1 December would be allotted as an opposition day, and that a "ways and means" vote would be held to formally proceed with measures contained in the economic statement. This set the stage for two confidence motions to be voted on that Monday. Harper indicated that the ways and means motion was a confidence measure; this is normally the case since voting against it would prevent the introduction of key financial legislation. Because it was the first day allotted to the opposition, the Liberal Party would also be able to set the agenda and propose motions to

be voted on that day. Dion tabled a motion that would have been an explicit test of confidence in the government:

That, in light of the Conservatives' failure to recognize the seriousness of Canada's economic situation, and its failure in particular to present any credible plan to stimulate the Canadian economy and to help workers and businesses in hard-pressed sectors such as manufacturing, the automotive industry and forestry, this House has lost confidence in this government, and is of the opinion that a viable alternative government can be formed within the present House of Commons.³

Thus, the stage was set for the apparent defeat of the government on 1 December. It is noteworthy that Dion's proposed motion not only stated that the House had lost confidence in the government, but that a viable alternative government could be formed.

The government had begun to look for room for compromise on Friday, 28 November, when it mentioned that the controversial proposal to eliminate party subsidies would not be a part of the ways and means motion the following Monday, 1 December. This gave some hope that the opposition might vote for the ways and means motion to allow proposed changes to the Registered Retirement Savings Plan to proceed. However, the opposition parties all responded with statements that they would still vote no confidence in the government, principally because it had failed to provide an economic stimulus package; the door was open, however, to vote in favour of the ways and means motion, while also supporting Dion's confidence motion. In the face of this concerted opposition stand, Harper announced the next day, Saturday, 29 November, that the allotted opposition day and the ways and means vote would not be held on Monday as originally planned, but would be postponed until the following Monday, 8 December. The government is able to do this, even when in a minority position, because it alone controls the order paper and can reschedule most votes almost at will.⁴

Late on Sunday, 30 November, opposition parties confirmed with various media outlets that they had reached a formal agreement to

form a coalition government to replace the Conservative Party. The following day, Monday, 1 December, the leaders of the Liberals, NDP, and the Bloc Québécois held a joint news conference to announce the agreements, which they signed, to create a coalition government composed of Liberal and NDP cabinet ministers; this coalition cabinet agreement would initially last two years but could be extended. The Bloc agreed to support this coalition cabinet in all confidence votes for an eighteen-month period, which could be lengthened.⁵ These agreements were then approved by the three party caucuses. Dion would be the prime minister of this government, but he would step aside and be replaced by whoever won the Liberal leadership convention in May 2009.

The government responded with a public relations campaign attacking the proposed coalition on several fronts. First, various spokespersons referred to the opposition trying to steal the government and overturn the results of the October election. The opposition leaders were said to have denied the possibility of a coalition during the election campaign; thus, they could only legitimately form a coalition government if they went back to the people in a fresh election and campaigned on that promise. The rhetoric got quite inflammatory, with such statements as Conservative Member of Parliament Patrick Brown referring to "this coup d'état, this non-election, this takeover of democracy."⁶ Second, an emotional attack was made on the role of the Bloc Québécois. The proposed coalition was said to endanger the country, since it was to be propped up by a group of separatists dedicated to breaking it up. Both messages of this public relations campaign appeared to resonate among many in the public, particularly in the West.

The Governor General, meanwhile, was still out of the country on her tour of Eastern Europe. Dion and NDP leader Jack Layton both wrote to her on Monday, 1 December to convey their intention to vote no confidence in the government and to form a coalition government with the support of the Bloc.⁷ Although she received no advice from the Prime Minister to do so, the Governor General decided to

cut short her trip and return to Ottawa on Wednesday, 3 December, and arranged to meet with the Prime Minister the next day. On that Wednesday evening, the Prime Minister and the three opposition party leaders each made televised speeches to the nation. The next day, the three opposition leaders sent essentially identical petitions to the Governor General, signed by 161 opposition MPs from the Liberal, NDP, and Bloc Québécois caucuses, accompanied by a covering letter from Dion. In this letter Jean was informed of their intent to vote in favour of Dion's no confidence motion, then scheduled to be dealt with on the following Monday, 8 December; the motion also supported an alternative government and was reproduced in the petition.⁸ Harper met with Jean on the morning of Thursday, 4 December for over two hours. During this meeting, he advised her to prorogue Parliament and to set its recall for 26 January 2009. She agreed to his request and signed the proclamation, ending the first session of the fortieth Parliament. Harper then announced to the press that he would schedule a full budget to be presented on 27 January. Many believed that the postponed question of confidence would be settled by the budget speech set for 27 January. But this is an erroneous assumption since the delivery of the speech is a completely separate event from any votes related to the budget. The government is in complete control of the timing of votes on both the budget and the new speech from the throne. There can be, in fact, no assurance of when the government would actually face a confidence vote in the new session.

The fundamental question to emerge from these events concerns the Governor General's decision to prorogue Parliament. Did she defend or endanger parliamentary democracy by suspending Parliament?

Assessing the Decision to Prorogue Parliament

The Governor General reached a very difficult and historic decision in agreeing to the Prime Minister's request to prorogue Parliament on 4 December 2008. A difficult

decision implies that there were good reasons to decide either way, and there are several reasons to defend the decision to prorogue.

There is little guidance to be had from historic precedent, as no prime minister in Canada has asked for prorogation in the face of an almost certain defeat on a confidence vote. Prorogation is normally granted after many months of parliamentary business have elapsed. There are only two other instances of Parliament's suspension only a few weeks into a session following a general election. In 1988, Parliament was prorogued after only eleven sitting days, but the prorogation period actually covered seventy-eight days, since it overlapped with the Christmas break. Prorogation came after only fourteen calendar days and twelve sitting days in the first session after the 1930 federal election. In both 1988 and 1930, however, the government had a solid majority in the House of Commons, and there was no question that prorogation would permit the government to avoid defeat. This was not quite the case when Prime Minister Sir John A. Macdonald asked for prorogation during the controversy that had erupted over the pacific (customs) scandal in 1873; but again, in 1873 there was no specific confidence vote being avoided. The closest we come to a similar scenario is the famous King-Byng episode in 1926, when Prime Minister Mackenzie King asked Governor General Lord Byng of Vimy for dissolution just days before a vote was due on a confidence motion relating to a scandal. At the time, it seemed almost certain that Mackenzie King's minority government would be defeated by the combined opposition parties. Lord Byng refused dissolution on the grounds that the government should not have tried to avoid censure in the House, and also because he believed that an alternative government could be formed by Arthur Meighan's Conservative Party. Mackenzie King resigned and Meighan led a short-lived government before being defeated on a confidence motion, and again in the subsequent general election. A heated debate has raged in the decades since over the propriety of Governor General Byng's decision. The difficulty in trying to apply this 1926 precedent is that the circumstances of government formation, and

the particulars of the defeat of the Meighan government, are unique to the time and cannot be easily compared with the contemporary situation. In the absence of a clear precedent on which to base a decision, constitutional principles play a key role in providing insight into what obligations are involved.

Several constitutional principles are relevant to the decision to prorogue Parliament in 2008. Conflicting considerations come from the application of these principles; nevertheless, when all are weighed together some clear conclusions are evident.

First and foremost, the Governor General has a duty to intervene in the political process as little as possible. She is an appointed official, and so the Governor General must allow ample room to let the elected politicians try and resolve a crisis among themselves. They alone are directly accountable to the electorate and should be given considerable latitude. In this light, the Governor General should avoid substituting her judgment for those of the politicians. One could say then that the decision to prorogue was really Stephen Harper's, not Michaëlle Jean's. However, that may be an over simplification. As the public commentary of most constitutional authorities and political actors at the time revealed, there was a general acceptance that the Governor General had a personal decision to make, and she would be acting within her constitutional powers to refuse or grant prorogation. Being a personal decision, the Governor General's choice was destined to be a substantial intervention in the political process regardless of whether or not she granted prorogation. In fact, her decision to grant Harper's request prevented the elected members of Parliament from resolving the issue in a timely fashion. The Governor General was clearly informed by the opposition parties of their intent to vote no confidence in the government on 8 December, and to form an alternative government. Indeed, the morning of her meeting with the Prime Minister, the Governor General received petitions signed by the caucus members of all three opposition parties clearly stating that they intended to vote no confidence in the current government and

instead support a Liberal-NDP coalition cabinet. Thus, she chose to acquiesce to the decision of a prime minister leading a minority party that would otherwise have faced certain defeat. Alternatively, the Governor General could have facilitated the stated intentions of the majority of MPs whose parties had been supported by a majority of voters in an election held only seven weeks before. The question then arises whether the Governor General had a higher obligation to follow the advice of the Prime Minister rather than the opposition majority.

The governor general is indeed normally bound to act on any constitutional advice offered by a prime minister who commands the confidence of a majority in the House of Commons. This convention protects the principles of responsible government and parliamentary democracy. Since the Conservative government won the confidence votes held on the speech from the throne just one week prior, Harper could apparently address the Governor General with authority. In normal times, there would be no question that the Governor General should have granted early prorogation, just as her predecessors had done three times in the past. However, these were not normal times, and the circumstances raise serious doubts about both the constitutionality of the advice offered by the Prime Minister, and his authority to offer that advice.

The Prime Minister's request to prorogue Parliament to avoid defeat on a vote of confidence is of questionable constitutionality. Scholars around the Commonwealth have decried such a tactic. A similar event had not happened in modern, stable parliamentary democracies because prime ministers have understood that it is their duty to face Parliament; a prime minister rejecting this duty in Canada is unprecedented in modern times. It has happened in moments of turmoil in unstable political systems, as it did in Sri Lanka in 2001. The ability to simply shut down Parliament to avoid losing office is fundamentally antidemocratic and a mark of authoritarian governments that abuse their powers to stay in office. Indeed, Canadian constitutional practice has so valued the necessity of a prime minister facing Parliament

and settling questions of confidence that the rules had required a prime minister to settle the matter within as short a time as possible. The necessity to resolve a test of confidence quickly has generally been ascribed to the example of Lester Pearson, who moved and won a confidence motion the week following the defeat of a tax bill in 1968, at a time when many from his party were absent from Ottawa. When Paul Martin's government faced a serious challenge in May 2005, with the passage of a motion that all the opposition parties agreed was a vote of confidence, there was very strong pressure on Martin to resolve the issue definitively within a very short period of time. In the end, he agreed to hold a definitive confidence vote ten days later, which he won by one vote after Belinda Stronach crossed the floor and joined the Liberal Party. The lesson from the precedents, then, is that matters of confidence must be resolved as quickly as possible.

The necessity to determine Parliament's confidence in a government is all the more important in the early weeks following an election in which no party won a majority of the seats in the House of Commons. Only the elected members of the House can determine which party has the right to govern in a minority situation. The incumbent prime minister has a right to meet Parliament after an election, but that is all. The prime minister must win and maintain the confidence of Parliament in order to continue governing, but the Governor General has prevented a newly elected Parliament from expressing its judgment on the Prime Minister and cabinet. Indeed, when it was shut down the House of Commons was fully engaged in its proper role of determining which group really held its confidence to govern after the October election.

The fact that the government had won its vote of confidence on the speech from the throne the week before did not establish its unquestionable right to govern, especially since the government's motion on the address in reply was successfully amended with very important caveats relating to the authority of the opposition parties to speak for a majority of Canadians. The government delivered its

economic statement on the very same day that the speech from the throne was approved. This economic address was the first major piece of government business to be proposed in the new Parliament, and it was immediately rejected by all three party leaders in the House. Their instant rejection of the measure and the subsequent agreements they signed demonstrably undermined the authority of the government.⁹

The particular confidence vote annulled by prorogation was all the more crucial since the government had previously delayed it by one week. The government had already benefited from an acceptable grace period with a one-week delay in the confidence vote, but it then had a duty to resolve the issue. In the context of the timing of the crisis — the very opening weeks of a new minority Parliament — any vote of confidence becomes crucial as the House decides which party has their confidence. Furthermore, the opposition parties used this delay to agree to a new government that would be supported by a majority of members of Parliament. A signed agreement ensured that all of the opposition parties with a majority of members in the House would support a coalition government for at least eighteen months. A documented, alternative government reinforced the Governor General's duty to ensure that that MPs could vote on the scheduled confidence motion. This impending confidence vote, the week-long delay, and the existence of an alternative government greatly undermined the Prime Minister's authority to advise prorogation.

It is important to note that the Prime Minister is not the Governor General's exclusive advisor. He is her *prime* minister, and the only one who can present binding advice. However, the Governor General can, and should, consult other advisors. She has the benefit of her own personal secretary, the clerk of the privy council, and any other constitutional authority she might privately engage; indeed media reports revealed that the former Dean of Osgoode Hall Law School, Peter Hogg, was present in Rideau Hall to advise the Governor General during her conversation with the Prime Minister on

the morning of 4 December.¹⁰ When there is a question of Parliament's intent to support the government, or the slightest possibility that an alternative government might be considered, the Governor General also has a duty to acquaint herself with the views of the opposition leaders.

The existence of an alternative government is crucial to the governor general's ability to refuse the prime minister's advice, or to insist that the prime minister do any specific thing (such as agree to an election). A fundamental constitutional convention requires that a prime minister must accept political responsibility for the governor general's exercise of any of her prerogative powers, including the reserve powers. Although there are certain circumstances in which the governor general may use her discretion, there must still be a prime minister accountable to the House of Commons in place after that decision is made to accept political responsibility. If the current prime minister will not agree, then the governor general must appoint another who will.

Since there is some expectation that a prime minister will resign if the governor general refuses his or her advice, the governor general cannot refuse advice without being certain in advance that another individual will accept appointment as prime minister afterwards. By agreeing to become the new prime minister, that individual must necessarily defend the governor general's decision to the public at large. In this case, the opposition parties had clearly told the Governor General that they were prepared to support a new prime minister; she had the signatures of a majority of MPs as proof of this commitment.

One other relevant consideration regarding the formation of the alternative coalition government is whether it was constitutionally appropriate to rely on a signed agreement with the Bloc Québécois. Public fears about the role of the Bloc were fanned directly by the government's public relations campaign, and it appears that this message resonated with a number of Canadians. A Leger Poll conducted on 2 and 3 December found that 49 percent of Canadians were "very concerned" about the role of the Bloc, and a further 19 percent

were "somewhat concerned."¹¹ However, these concerns are essentially political in the broad sense, rather than constitutional, and appear to be largely overblown. Bloc MPs have been winning elections to Parliament for over fifteen years, served constructively as the Official Opposition from 1993-97, and were part of negotiations with the Conservative Party over support for a possible alternative government in 2004 and 2005. Furthermore, the Bloc's willingness to support the proposed coalition government for at least eighteen months seems to clearly commit the party to stabilizing Canada's system of government rather than empowering it to undermine national unity. It would also have been highly inappropriate for Governor General Jean to have discounted an alternative government by asserting that one party caucus could never participate as any other in the affairs of state; that would have been an insupportable intervention into partisan affairs.

Those supporting the Governor General's decision to prorogue Parliament have rightly pointed out that she must also consider the likelihood that an alternative government would be able to function for any meaningful time if it were to take office. They point out that Stéphane Dion was a lame duck leader going into this affair, pressured by his own party to resign after the election, and that his personal authority was further undermined by a disastrous performance in the televised address the night before Harper met with Jean. Furthermore, there was evidence that the anti-Bloc campaign was making inroads into public consciousness, and that some NDP and Liberal backbenchers were increasingly uncomfortable with the backlash they would face from their voters in the next election, were the coalition to be asked to form a government. While there is merit in these considerations after the fact, one has to consider the balance of evidence available at the time about the current Conservative government's prospects for survival, as opposed to those of the coalition. At the time, the only thing that was certain was that the government only had the support of 143 of a possible 308 votes in the House of Commons. In contrast, the potential coalition government was supported by a signed agreement among

all three opposition leaders, and a majority of MPs had signed petitions that stated their lack of confidence in the current government, as well as their support for the coalition. In this light, the incumbent government's prospects should have appeared to be nil in comparison to those of the coalition.

Other doctrines guiding the work of governors general arise from their duty to ensure that the basic principles of parliamentary democracy are allowed to function. The first and most important principle of parliamentary democracy is that the government of the day must win and maintain the confidence of the House of Commons. Thus, a governor general has a central duty to ensure that there is a government in office which commands the confidence of the House of Commons. This duty is particularly important in the early months following a general election that returns a House of Commons divided among minority parties. By suspending Parliament, the Governor General prevented it from fulfilling its duty.

In our parliamentary system, the governor general also exists to provide a last bastion against abuses of power by the government. Such protection is all the more important for matters for which there is no recourse to the courts. The basic functioning of responsible government and the operations of Parliament are not subject to judicial review; the governor general alone stands as a bulwark against certain constitutional abuses.

Finally, the governor general also has a duty to not to undermine the very office she occupies. There were clear indications that the Conservative Party would have unleashed a harsh campaign criticizing the Governor General if she had refused prorogation and subsequently appointed the coalition to power. It is likely that she would have been attacked with the same two-pronged message used against the opposition parties. First, as an appointed official who had rejected the advice of the duly elected prime minister, she would have been accused of undermining democracy. Second, as a Liberal appointee who had staged a palace coup and installed the Liberal Party in power, she would have been condemned for

ignoring that party's disastrous showing in the election, not to mention the extent to which its leader had become discredited. In short, she would have been blamed for forcing from office a prime minister whose party had "won" the recent election. The Governor General could have been further vilified for being married to a Québec nationalist, underlining the message that the new government was providing opportunities for separatists to break apart the country. Public rallies and a media blitz would have likely spread considerable anger aimed at the Governor General. Nevertheless, the Governor General has a higher duty to defend the principles of parliamentary democracy and to prevent fundamental abuses of power where possible. It is a given that there will be profound controversy generated whenever any governor general is forced to stand up to a prime minister determined to wield power at the expense of basic constitutional principles such as responsible government. Although no governor general should generate unnecessary controversy, each should refuse to consider her own position when our democratic institutions and principles are at stake. The alternative is to risk caving in to abusive governments simply to avoid controversy and public protest. The responsibility for defending the governor general's actions to the public lies squarely on the shoulders of any new government that might be appointed.

Justifying a Duty to Refuse Prorogation

The combination of these factors produce a powerful argument that the Governor General had a duty to refuse the Prime Minister's advice to prorogue Parliament. This conclusion is underlined by the following summary of principles and their application to the decision to prorogue:

- *The governor general has a broad duty to let the normal political actors and processes resolve political problems.* Without the prorogation of Parliament, elected politicians would have resolved the issue on 8 December. The political resolution of the

problem has now been delayed for a couple of months. Although the government promised to deliver the budget on 27 January, there is no deadline for holding the actual votes on either the budget or the new speech from the throne.

- *The governor general has a duty to act on any constitutional advice offered by a prime minister who enjoys the confidence of the House of Commons.* But the advice to prorogue Parliament is arguably unconstitutional. The Prime Minister's authority to advise the Governor General was undermined by the existence of a signed agreement for an alternative government supported by the majority of MPs, only two weeks into a newly elected Parliament.
- *Serious doubts about Parliament's confidence in the government must normally be settled in relatively short order.* Precedents suggest that between a week and ten days is an appropriate length of time. In 2008, the government had already exhausted this window, and there was no certainty about when a confidence vote would be held on the resumption of Parliament.
- *The governor general can only refuse advice if she can appoint an alternative government.* Opposition leaders had written to the Governor General several days ahead of her meeting with the Prime Minister. She was clearly informed that the majority of MPs intended to vote no confidence in the current government, and of their commitment to support an alternative government for a minimum of eighteen months. Based on the petitions signed by a majority of MPs, the prospects for that alternative government seemed far higher than for the current government.
- *The head of state in a parliamentary democracy exists to protect it from serious abuse by a government in situation where there is no judicial remedy.* In principle, it is quite clearly an abuse of power for a government to suspend Parliament for two months when faced with imminent defeat. The abuse was all the more striking in this

case because Parliament was prorogued just three weeks into the first session, after an election had returned only minority parties.

- *The governor general should put the fate of democratic principles and institutions above any worries about possible controversy generated by those she is preventing from abusing their powers.* Abusive governments will not acquiesce quietly to being forced from office, and a governor general must be prepared for ensuing protests. The new prime minister and supporters would have a duty to defend the Governor General's actions to the public.

A fundamental litmus test for any important decision by a governor general is the kind of precedent it sets for the future. By granting prorogation, the Governor General not only allowed the current Prime Minister to escape almost certain defeat in a confidence motion, but she also set the stage for every future prime minister to follow suit.

With this precedent, any prime minister can demand that the governor general suspend Parliament whenever he or she believes a successful vote of no confidence is imminent. And since the constitution only requires that Parliament meet once within a twelve-month period, the "time out" bought by prorogation can be a significantly long period indeed. Even once Parliament reassembles, there is no guarantee that the government will actually face another vote of confidence at a particular time, since the scheduling of most votes is the prerogative of the government. This precedent is a damaging and dangerous consequence of the Governor General's decision. If this precedent stands, no future House of Commons can dare stand up to a prime minister without putting the House in danger of being suspended until the prime minister believes it has been tamed.

Other considerations, such as the benefits of a prolonged cooling off period, the lack of an electoral mandate for a coalition, or the role of the Bloc Québécois are absolutely none of the Governor General's concern when making a decision on constitutional grounds. They are purely political matters that must be left to

members of Parliament to sort out in their own time and in their own way. Indeed, it would be highly improper for the Governor General to base her decision on such political factors.

Since the Governor General prorogued Parliament, a number of commentators have expressed some relief over her decision, even if they are also concerned about the precedent it sets. A lack of public support for both prorogation and the invitation of the coalition to form a government have also been widely alluded to as a justification for the Governor General's decision. However, public opinion is not as clear as some assume, and many have based their judgment of her decision to prorogue Parliament on basic misperceptions of how parliamentary government works, particularly in a minority situation. An Ipsos poll conducted just prior to the Governor General's decision found that 68 percent of Canadians supported the suspension of Parliament.¹² However, two polls conducted once the decision to prorogue Parliament was known reveal a much narrower split in public opinion. An Ekos poll conducted on 4 December, the day of the decision, found 45 percent in favour of prorogation and 43 percent opposed.¹³ An Angus Reid Poll conducted over the next four days found 51 percent in favour and 41 against prorogation.¹⁴ Two important points need to be made about these poll results. First, the suspension of Parliament was not the clear choice of a strong majority of Canadians, once prorogation had occurred. Second, the level of support recorded for prorogation is largely due to the support of Conservative voters. In the Ekos poll, 80 percent of Conservative supporters agreed with the Governor General's decision, compared to less than 25 percent of those supporting the three main opposition parties. Such a clear partisan split suggests that popular support for prorogation hardly represents a national consensus.

On balance, it appears that the Governor General failed to defend Canadian parliamentary democracy and opened the door to repeated abuses of power by future prime ministers. Our newly elected MPs were about to pronounce authoritatively on which parties would have their confidence to govern, but they

were prevented from doing so by the Prime Minister's request to prorogue Parliament. We elect Parliaments not governments in Canada, and Parliament must be free to determine who governs after an election. The threat of a vote of no confidence in the government is the only real lever the individual elected members of Parliament have against the weight of cabinet. A dangerous precedent was set with the prorogation of Parliament to avoid a confidence vote, and it risks depriving Parliament of its only major defence against subjugation to the whims of the prime minister and cabinet. Future prime ministers now know they can shut down Parliament whenever they are threatened with defeat.

Notes

- * Associate Professor, Department of Political Science, Simon Fraser University. This article is an excerpt from Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?" *Points of View* (No. 7, 2009).
- 1 Andrew Heard, "2008 Election Results," online: Elections <<http://www.sfu.ca/~aheard/elections/results.html>>.
- 2 *House of Commons Journals*, 40th Parl. 1st sess., No. 06 (25 Nov 2008) at 38, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/Journals/006/Journal006.PDF>>.
- 3 *House of Commons Order Paper and Notice Paper*, 40th Parl. 1st sess., No. 10 (1 Dec 2008) at 18, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/NoticeOrder/010/ordpaper010.PDF>>.
- 4 The prime constraint is that a certain number of opposition days have to be held with a particular calendar period and prior to certain financial votes. The government can choose on which specific days those events take place. Curiously, this gives the government the power to choose the timing of many votes of confidence, which it can do to its advantage.
- 5 For details of the Liberal-NDP coalition agreement, see "An Accord on a Cooperative Government to Address the Present Economic Crisis," online: Liberal Party of Canada <http://www.liberal.ca/pdf/docs/081201_Accord_en_signed.pdf>; for the Liberal-NDP-Bloc agreement, see "A Policy Accord to Address the Present Economic Crisis," online: Liberal Party of Canada <http://www.liberal.ca/pdf/docs/081201_PolicyAccord_en_signed.pdf>.

- www.liberal.ca/pdf/docs/081201_Policy_Frame_en_signed.pdf>.
- 6 *House of Commons Debates*, No. 010 (1 December 2008) at 438 (Mr Patrick Brown), online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/House/401/Debates/010/HAN010-E.PDF>>.
 - 7 The letters have been made available from the Liberal Party website: "Opposition Parties Sign Agreement to Form Alternative Government," online: Liberal Party of Canada <http://www.liberal.ca/story_15508_e.aspx>.
 - 8 All three petitions and the covering letter are available from the Liberal Party website: "Opposition Parties Deliver Petitions to Governor General," online: Liberal Party of Canada <http://www.liberal.ca/story_15520_e.aspx>. Each of the petitions read:
We the majority of the members of Canada's House of Commons, humbly inform you that we would vote in favour of the motion proposed by the Official Opposition and that reads as follows: That, in light of the Conservatives' failure to recognize the seriousness of Canada's economic situation, and its failure in particular to present any credible plan to stimulate the Canadian economy and to help workers and businesses in hard-pressed sectors such as manufacturing, the automotive industry and forestry, this House has lost confidence in this government, and is of the opinion that a viable alternative government can be formed within the present House of Commons.
 - 9 Perhaps the fundamental mistake the opposition parties made came with the final vote on the address in reply to the speech from the throne. It is a real curiosity that the opposition leaders announced their intention to vote against the government's economic statement on the afternoon of 27 November, and then minutes later allowed the government to win a crucial test of confidence with the address in reply. In hindsight, much of this crisis would have been averted if the opposition had simply acted on their intent to vote against the economic statement by defeating the address in reply, which would have been an unquestionable loss of confidence and the government would have had to resign. Since the change of office would not have been instantaneous in any event, they would have still had the coming weekend to work out the details of the coalition they eventually agreed upon. Alternatively, the opposition could have boycotted the vote on the address in reply if they felt the need to buy time before actually defeating the govern-
 - ment. If government members had been the only ones voting in favour of the throne speech, the Prime Minister would have been deprived of the legitimacy he later drew from advising the Governor General as a Prime Minister who had won the confidence of the full House.
 - 10 Michael Valpy, "GG Made Harper Work for Prorogue," online: *Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20081205.wgg06/BNStory/National>>.
 - 11 Leger Marketing, "National Opinion Poll," online: <<http://www.legermarketing.com/documents/pol/081241ENG.pdf>>.
 - 12 Ipsos, "Majority (68%) Of Canadians From Every Part Of Country Supports Governor General's Decision To Prorogue Parliament," online: <http://www.ipsosna.com/news/client/act_dsp_pdf.cfm?name=mr081204-6a.pdf&id=4201>.
 - 13 Ekos, "Poll Results: A Deeply Divided Public Ponders Prorogation," online: <<http://www.ekoselection.com/wp-content/uploads/poll-results-dec-5-final.pdf>>.
 - 14 Angus Reid, "Half of Canadians Think Governor General Made the Right Decision," online: <http://www.angusreidstrategies.com/uploads/pages/pdfs/2008.12.08_Jean.pdf>.