

The Governor General, the Prime Minister and the Request to Prorogue

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Abstract

The unusual request to prorogue parliament, made by the prime minister of Canada Steven Harper just prior to a scheduled vote of non-confidence, provoked considerable debate in Canada. This article examines the events leading up to Harper's request as well as the constitutionality of the Governor General's decision to accept it. It argues that the Governor General followed the only reasonable course of action available to her.

Looking ahead, it is arguable that the silly coalition, the bully Prime Minister and the uncertain Governor-General have awakened Canadians. (MacGregor 2008)

Introduction

On February 3, 2009, the amended budget presented by Canada's Conservative government passed easily with the support of the Liberal opposition.¹ Thus ended a remarkable chapter in Canadian parliamentary history, which some were quick to label a "constitutional crisis." Two events made this episode so noteworthy. The first was the agreement signed by the three parties in opposition – the Liberal party (Liberals), the New Democratic party (NDP) and the Bloc Québécois (Bloc) – under which the Liberals and the NDP, supported by the Bloc, offered to form a coalition government following a promised defeat of the Conservatives on a scheduled confidence motion. The second was the

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decision of the Governor General, Her Excellency Michaëlle Jean, to accept Prime Minister Stephen Harper's request to prorogue parliament, allowing the Conservative government to avoid that same vote.

The constitutionality of both the proposed coalition and the Governor General's decision to grant the prorogation request was immediately challenged. The Canadian parliamentary system follows the Westminster model and practices what is known as "responsible government."² One of the principles of responsible government is that a government must be supported by a majority of the members of parliament in the House of Commons. However, under the modern party system, identifying such support is rarely problematic, and Canadians are accustomed to thinking of general elections as having been won or lost by specific political parties. In the case of the 2008 General Election, the Conservatives claimed to have "won;" therefore, any attempt to change that result without another election was, by this argument, unconstitutional or at least undemocratic. Another principle of responsible government requires the governor general to act on the advice of the prime minister and cabinet. This is usually interpreted to mean that (normally) the governor general must act and can only act on such advice. However, under special and unusual circumstances, a Canadian governor general might need to either reject the advice of a prime minister or act independently. To do so would be an exercise of the office's reserve or emergency powers.³ Harper had requested a prorogation in order to avoid a vote of confidence he was certain to lose. The prorogation request, according to this line of argument, was therefore itself in violation of the principle of responsible government as it denied the House of Commons its constitutional right to withdraw its confidence and, thus, majority support of the Government. Hence, the Governor General should have exercised her reserve powers and rejected Harper's request.

This article looks at the proposed coalition and the Governor General's decision to prorogue parliament, both of which reveal much about the way parliament works. I argue that neither the Prime Minister's request nor the circumstances surrounding it constituted an emergency and therefore did not warrant the Governor General's use of her reserve powers. Furthermore, while the coalition proposal was perfectly acceptable under both democratic and constitutional principles, its viability was uncertain. The viability of the Coalition would not have been a factor had, say, the Harper government resigned and the Governor General needed a new government to take over. It would have been a factor if the Governor General worried about the consequences of rejecting a request by her prime minister, because there was a very real possibility that she would have then been put into the position of having to call upon Stéphane Dion to form a government. At the time Michaëlle Jean acceded to Harper's request, Canada's Parliament may have been acrimonious, but was nevertheless manifestly workable. Therefore, her decision to accept the prime minister's request for prorogation fulfilled her duties and responsibilities as Canada's governor general.

The Aftermath of the 2008 General Election

Although the incumbent Conservative party did improve its standings from 127 to 143 seats,⁴ Canada's 40th General Election (October 14, 2008) did not provide any political party with a majority, and this was the third election in a row to result in a hung parliament (2004, 2006, and 2008). Nevertheless, with just 12 seats shy of a majority, Harper's claim to remain prime minister was not in doubt. After all, his only potential rival was Liberal leader Stéphane Dion, whose party recorded its worst result since 1984.⁵ Holding 95 seats⁶ at dissolution, the Liberals were reduced to just 77 seats in 2008, 26 seats fewer than the party had won in 2006. In the wake of such a defeat, Dion announced he would resign as soon as the Liberals chose a new leader at their next convention, then scheduled for April 2009.⁷

The First Session of the 40th Parliament began November 18, 2008, and the first few days proceeded normally enough. After five secret ballots, the Commons successfully elected a speaker. Prime Minister Harper introduced the *pro forma* Bill C-1,⁸ which provoked minimal comment,⁹ and then the House was duly summoned to the Senate Chamber for the Speech from the Throne, delivered later that day (November 19, 2008). The debate on the "Address in Reply" began on November 20, with the usual amendments and subamendments proposed by the opposition.

The Liberals in Official Opposition made no attempt to use their amendments to bring down the government. Instead, as Dion explained, the Liberals merely wanted to insert a statement of principle into the Address under which the Government acknowledged that, without a majority, it was under some obligation to consult the opposition parties on key policy areas. The Conservatives countered by warning the House that the Government expected all parties to deal with the scheduled votes (on the subamendment, amendment, and finally the Address) expeditiously “because this will be a confidence matter.” Still, the Liberal amendment received general support, including support from the Government side,¹⁰ and on November 27, 2008 the Address as amended was passed without the need for a recorded vote.¹¹

Just before the final vote on the Address, Minister of Finance Jim Flaherty presented an “economic update.” This was not to be a budget, but rather a statement designed to calm the fears of worried investors in the wake of a world-wide economic crisis. The response to the update, while not surprising, was nevertheless far more vociferous than the Government expected. One issue which seemed to be particularly galling to the opposition parties was the decision to eliminate direct public financing of political parties.¹² However, it would be incorrect to suggest that this was the only factor informing the opposition parties’ next set of moves. They consistently argued that their main concern was their loss of confidence in the ability of the Government to manage the growing economic crisis.

The Liberals then gave notice that they would move a vote of nonconfidence in the government on the following Monday, December 2, 2008, its “opposition day.” Given that this vote would come in the wake of the economic update, the Liberals argued that the nonconfidence vote would be fatal as it would carry the same weight as a defeat of a budget. The Government responded by postponing the opposition day by one week (to December 8, 2008), and cancelling a ways-and-means motion that had also been scheduled for December 2.¹³ A loss of either vote would likely have been sufficient to force the government to either resign or request a dissolution.¹⁴ Therefore, the Government did what it thought necessary to buy some time.

The Conservatives must have assumed that the longer the opposition parties had to think about the prospect of forcing an election, the better the chances one or more parties, specifically the Liberals, would back away from voting against the Government. Furthermore, some Liberal MPs were now voicing their impatience with Dion’s leadership, calling on him to resign now, rather than wait for the April convention (Taber, 2008a). Led by an unpopular and lame-duck leader, it did indeed seem highly unlikely that the Liberals would provide the Conservatives with an excuse to call another election. But the Conservatives must have been surprised by what the Liberals did instead.

No doubt modelling their actions on the 1985 Ontario Liberal-NDP Accord (see White, 1988), the leaders of the federal Liberal, NDP and Bloc parties reached an agreement under which they would present to the Governor General the option of calling on the Liberals and NDP to form a coalition government, were the Conservatives to be defeated on the nonconfidence motion. Although its MPs would not be invited to join the coalition cabinet, the Bloc promised not to vote against the Coalition on matters of confidence. The immediate effect was panic within the Government. But still believing that time would work against the opposition alliance, Harper then made an unusual move. Despite the pending confidence vote, the Prime Minister asked the Governor General to prorogue parliament. This was duly granted on Thursday December 4, 2008, with the Second Session of the 40th Parliament scheduled to convene Monday, January 26, 2009.

Yet the drama was not over yet. On December 3, 2008, the night before he was scheduled to meet with the Governor General, Harper went on national television to explain why he was about to request a prorogation. Liberal leader Dion followed suit with a televised address described by commentators as an amateur video better suited for YouTube (Doyle 2008). This seemed to be the last straw for the Liberal caucus, and calls for Dion’s immediate resignation now grew stronger (Whittington and Brennan 2008; Clark and Chase 2008). The pressure to leave proved too much, and on December 8, 2008, Dion clarified what he meant when he promised to resign as soon as the next leader was chosen: he would resign immediately if the party could find a means to choose his replacement immediately (Laghi and Clark

2008). However, choosing a new leader immediately was not simple. In addition to the problems presented by the Liberal's constitution regarding the choice of a national leader, three MPs had already declared their candidacy for the position: Michael Ignatieff, Bob Rae¹⁵ and Dominic LeBlanc (the first two having run against Dion in the previous leadership contest). However, LeBlanc soon pulled out and threw his support behind Ignatieff. The next day (December 9, 2008), Rae announced that he too was no longer a candidate for the leadership, nor would he be in April 2009 (Taber, 2008b).¹⁶ This left the field to Ignatieff, who without further ado was named the Liberals' new leader.

Given that one potential problem with the proposed coalition was Dion's imminent resignation, the appointment of Ignatieff as the unchallenged leader of the Liberals should have strengthened the Coalition's argument that it could provide a stable government, and hence be a real and viable option were the Conservatives defeated. However, Ignatieff announced that he was open to several possibilities, only one of which was the proposed coalition: "A coalition if necessary," he stated, alluding to McKenzie King's famous 1942 plebiscite slogan, "but not necessarily a coalition." The Coalition quickly began to unravel and by the beginning of January 2009, few believed it had any future. This was confirmed January 28, 2009 when Ignatieff announced that the Liberals would support the Conservative budget, providing the Conservatives agreed to an amendment under which the Government would be obliged to provide frequent updates on the success of their economic stimulation measures (Clark and Taber 2009). The Conservatives were happy to comply and agreed to second the motion. The Liberal amendment was passed February 2, 2009 (Yeas 217, Nays 84; the Bloc and the NDP voting against). The amended Budget was passed February 3, 2009 with a vote of 211 to 91, and the Liberals supported all of the subsequent ways and means motions.¹⁷ The Conservative's tenure was extended and the coalition option dropped. In the next section of the paper, I will look at the political and constitutional implications of, first, the proposed coalition, and second, the request for prorogation.

A Government which has been granted a dissolution may not proceed to a second dissolution until the new Parliament proves unworkable and no other Government is likely and willing to carry on with the existing House. (Markesinis 1972)¹⁸

The Coalition

Coalitions are a rare beast in Canadian politics,¹⁹ so it should not be surprising that the prospect of a coalition government composed of Liberals and the NDP alarmed many, at least many Conservatives. Some of those who were concerned about the propriety of a coalition government seemed to believe (or purported to believe) that the Commons could, on its own volition, force the Coalition into office. The fearful scenario was presented something like this: the opposition parties, now united in a coalition / accord, would vote no confidence in the government at the first opportunity. The immediate consequence of that vote would be the replacement of the current government with one led by Liberal leader Stéphane Dion, whose cabinet would be composed of members from both the Liberals and the NDP.²⁰ The two parties would govern with the support of the Bloc, to which the Coalition was now beholden.²¹

Opponents, including the Prime Minister, argued that by receiving the most seats in 2008 the Conservatives had "won" the election and therefore had the democratic right to govern, a right manifestly denied the opposition parties.²² Not only did each of the opposition parties win fewer seats than the Conservatives, but these parties explicitly denied during the election campaign that a coalition government was an option they would entertain.²³ To overturn an election result by forcing the legitimately elected government out of office was therefore undemocratic, if not unconstitutional. Finally, the Bloc's role in this accord meant that the Coalition would be under the sway of a party whose unpatriotic agenda was the "dismemberment of Canada."²⁴

The criticism that the Coalition had not been voted into office, and therefore had no right to govern, can be dismissed immediately. It might well be easier, and even sociologically accurate, to think of elections as events in which voters choose one party over another to be their government.²⁵ Indeed, political parties have long used such an argument to

bolster the national standing of their leaders. However, this does not alter the fact that under the Canadian parliamentary system a general election is still the election of 308 MPs who are constitutionally and legally free to align themselves in any configuration they so desire. They can, and sometimes do, vote against their parties and they sometimes switch parties in the middle of a session, often with spectacular results.²⁶ The public seems to prefer it when government MPs vote against the Government or cross the floor to sit with the Opposition, rather than the other way around. But, the point is, alignments and realignments do happen and are perfectly legitimate under our current system. Furthermore, all 308 Members of Parliament, including the 49 Bloc MPs, were legally elected and are full participants in all parliamentary proceedings and affairs. The Bloc's agenda, however distasteful some may find it, does not diminish the status of that party's MPs, and so its support cannot be used as an effort to taint or delegitimize the actions of other parties or MPs.

As far as whether or not the coalition proposal was democratic, we need to keep in mind that even if it is true that voters thought they were choosing one party over the other, the 2008 election did not produce a majority, and so we do not know which party the voters preferred. This is precisely what a hung parliament means: a parliament in which *no* configuration of majority support is obvious or has been determined. Until the House of Commons meets and establishes its voting patterns, the question of who should – or can – govern remains unanswered. It is also false to claim that coalition governments are foreign to parliamentary democracy. In fact, a coalition government can be seen as an assertion of the fundamental right of the elected members of the House of Commons to determine who should govern, and as such, can be better seen as a vindication of parliament.

Finally, all of the concerns expressed here seem to assume that the Coalition had the ability to force itself into power, forgetting that the choice of a prime minister is still the prerogative of the governor general. The opposition does not have any standing with the Governor General when she is considering a dissolution or, for that matter, a proroguing request; she only takes advice from her prime minister, and only the most extraordinary circumstances would convince her not to accept that advice.²⁷ It is also pure fantasy to imagine a scenario in which a modern governor general would dismiss a prime minister at the request of the opposition parties, signed accord or not. No opposition party in the Canadian parliament has ever forced a government to resign. It is difficult enough to convince a stubborn prime minister to request a dissolution.²⁸ Therefore, unless the Prime Minister resigned on his own volition, there was little if any chance the Coalition would have been asked to form a government.²⁹ Meanwhile, from a constitutional standpoint anyway, the coalition proposal was just that: a proposal. It was legally binding on no one: not on the principals, not on the Bloc, and certainly not on the Governor General.³⁰

Until the principals publish their memoirs, we will not know whether the leaders of the Liberal, NDP or Bloc parties really expected the Coalition to be asked to form a government, or whether instead their coalition proposal was a strategy designed to frustrate the plans of the Conservatives. My assumption is the latter: if called upon, the leader of the Liberals would indeed have formed a government and would have duly included members of the NDP in his cabinet. I also assume that the Bloc would have honoured its agreement not to defeat this coalition on matters of confidence. But that aside, I suspect another game was afoot. The opposition strategy was more likely meant to remove – or give the impression it was removed – Harper's weapon: his threat to dissolve Parliament were the opposition parties to vote against his government.

While no party relished the idea of jumping back into a campaign so soon after the previous one, the Conservatives had the most to gain from an election and the Liberals the most to lose.³¹ As mentioned above, no doubt Harper was confident that while the Liberals might bluster, they would not provide the Conservatives an excuse to call another election. However, with the Coalition present as a viable alternative, the Liberals could vote against the Government with some impunity. With such an agreement in place, a confidence defeat would not necessarily lead to an election, but instead to a coalition government led by Dion. The Conservatives would certainly find such a prospect unpalatable, and so would be forced to find some other way of assuring the support of one or more of the opposition parties. Specifically, this would mean the opposition parties' presence would be noted and their leadership consulted on key

policy matters. Thus, the minority parliament would function the way opposition parties always hope (or claim to hope) minority parliaments will function: as a cooperative, deliberative chamber in which the opposition parties have a real and identifiable influence on government policy.³²

Whether their strategy for “winning the initiative”³³ was realistic, there is some merit in the opposition parties’ assumption that had the Prime Minister requested a dissolution, he might well have been turned down. Such a scenario has been well debated by parliamentary scholars. Markesinis writes that “[t]he Crown may under certain circumstances refuse a dissolution to a minority government (whether defeated or undefeated), provided an alternative government is possible and able to carry on with the existing House” (120). Rodney Brazier (2008) speculates in his *Constitutional Practice* that in the case of a hung parliament, an agreement amongst opposition parties to form a coalition should convince the Sovereign to reject a premature request for dissolution and instead prompt the invitation of the leader of the proposed coalition to form a new government, providing that coalition was viable (39).³⁴ This is supported by Vernon Bogdanor (1995), who states that the first circumstance under which the Sovereign is entitled to refuse a request for dissolution is “when an alternative government is available” (81; see also Carter 1956: 274 ff.). This is particularly true, Forsey emphasises, were a government to ask for a dissolution “whilst a motion of censure is under debate.” Under such circumstances, “it is clearly the Crown’s duty to refuse.” (1968: 269 and 186 ff.) Finally, Geoffrey Marshall (1984) quotes Sir Alan Lascelle, who

... suggested that a dissolution might be refused if (1) the existing Parliament was still vital and capable of doing its job, (2) a General Election would be detrimental to the national economy, and (3) the King could rely on finding another Prime Minister who could carry on his government for a reasonable period with a working majority in the House of Commons (39).

It seems clear, then, that the Governor General would have been well within her rights to refuse the Government had it requested a dissolution. The existing parliament was “still vital” as was evidenced by the fact that it had successfully elected a Speaker, had passed Bill C-1 and its “Address in Reply,” all of which required cooperation by members of the opposition parties.³⁵ That a General Election would be detrimental to the national economy strikes me as a spurious consideration and too subject to speculation. But if not, then certainly the difficulties the national and indeed world economies were facing in December 2008 were of sufficient magnitude to at least warrant prudence. In any case, it was readily apparent that the public would not have welcomed another election. As well, the Governor General had a viable alternative, or so the parties claimed, in the Coalition. With the agreement in place, one could certainly argue that the Coalition could be relied upon to govern for a “reasonable period” even if that was less than the promised two years. Finally, to grant a dissolution “whilst a motion of censure [was] under debate” would surely have been inappropriate.

These may be moot points, but they speak to the Prime Minister’s next move. The opposition parties may well have succeeded in convincing the Prime Minister that his option of requesting a dissolution was now eliminated. He at least knew there was a distinct possibility that if he made such a request that he would be refused. But I do not think the opposition parties guessed he would try another tactic altogether: to ask, not for a dissolution, but instead a prorogation. Either a dissolution or a prorogation would have the same effect.³⁶ Both would kill the scheduled nonconfidence vote. Yet the overall impact of a prorogation, while certainly serious, is not in the same magnitude as the devastating effect of a dissolution. Therefore, the circumstances and implications that must be taken into consideration, before such a request could or should be denied, differ as well. Ironically, the arguments that I dismissed above as irrelevant or misconstrued when applied to the legitimacy of the coalition proposal can now be seen to hold a kernel of validity when applied to the request for prorogation.

Ministers who, after Supplies were voted and the Mutiny Act³⁷ passed, should prorogue the House and keep office for months after the Government had ceased to retain the confidence

of the Commons, might or might not incur grave unpopularity, but would not necessarily commit a breach of law. (Dicey 1902, nt. 1: 26)

Constitutionality of Proroguing Parliament

Prime Minister Harper's announcement that he would ask the Governor General to prorogue parliament provoked predictable outrage amongst the opposition MPs. But NDP MP Pat Martin (2008) (Winnipeg Centre) probably went a bit too far: "It is worrisome," he stated in the Commons, "if the sovereign, in fact, overrides the will of Parliament. Kings have been beheaded for such things." Martin was not, one hopes, making a threat. Still, and perhaps inadvertently, he raised an important point. Had the Governor General acted on her own initiative and prorogued Parliament prior to a scheduled vote of confidence, then she could justly be accused of undermining responsible government. But is this still an issue when the Governor General is simply responding to a request made by her prime minister?

Like dissolution, but unlike an adjournment (which is solely a prerogative of the House), proroguing is a Crown prerogative.³⁸ However, as Mallory (1964) explains, "under responsible government the Governor General will only prorogue parliament on the advice of the prime minister. Further, only the prime minister has the right to make such a recommendation" (page number – reference).³⁹ Opinion is divided on whether the prorogation under discussion here was in fact constitutional.⁴⁰ Those who argue that it was not constitutional maintain that taking steps to avoid and indeed cancel a vote, one which promised to go against the government, undermines the principle of responsible government. Governments must maintain the confidence of Parliament. Governments do so by facing votes in the confidence chamber, the House of Commons. The Government's request to prorogue Parliament, while not unprecedented,⁴¹ was nevertheless extraordinary and amounted to a refusal by the Government to allow the House to hold it responsible. The Governor General, then, should have intervened and protected the constitution, which she has sworn to do. She should have at least refused the Prime Minister's request.⁴²

This argument has merit, but it is better applied to the issue of whether the Governor General should have refused a request for dissolution, had one been made. Unlike dissolution, prorogation does not dissolve parliament or erase the results of the election. It does not send the Members of Parliament back to their constituencies to run again. The standings in the House of Commons remain the same before and after the prorogation, and so any alliances marshalled against the Government are perfectly capable of remaining intact. So even if an argument can be made that the Prime Minister's request for prorogation was inappropriate (for example, Weinrib, 2009, and Jennifer Smith, 2009), this would not be sufficient reason for the Governor General to reject it. R. MacGregor Dawson (1944), in reviewing Eugene Forsey's *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1968), explained it this way:

But there is a wide distinction to be drawn between a badly conceived or unfair action by a Cabinet and an action so at variance with the law or spirit of the constitution that it imperils the existence of parliamentary institutions; the latter may justify the Governor's intervention, the former can be solved by more usual and far less objectionable means. (91)

What the Governor General did was give the government a chance to clarify what was a complicated and uncertain matter: did the government enjoy the confidence of the House of Commons, or not? Such a determination is not always simple, and a single vote against the government, even on important matters, is not always sufficient to make that determination. In the case at hand, while it seemed clear that the government was about to lose a crucial vote, it

was not clear that this represented a permanent loss of confidence. As well, by granting the prorogation, the Governor General also provided the Coalition with an opportunity to prove its own viability. A viable coalition should have survived both the wait and the change of leadership.⁴³ This was a test the Coalition failed.

There are other reasons why the Governor General would have been well advised to accept the request for prorogation. Consider what would have happened had the Governor General refused it. Andrew Heard (2009b: 57) writes that “in 2008 there were very clear indications that Stephen Harper would not have remained in office simply to be defeated in the House.”⁴⁴ Ned Franks (2009: 46), however, believes that Harper would not have resigned. He believes “that Harper would have then continued his inflammatory and constitutionally incorrect but popularly support (outside Quebec) rhetoric.” Both, I suggest, would agree that in any case it is unlikely that, having his request for prorogation denied, the Prime Minister would have meekly returned to his job.⁴⁵

Neither of these options presented by Heard and Franks would have been palatable for the Governor General. Had Harper's request for prorogation been denied, but he remained prime minister, he would attack the Governor General for her decision. Had he resigned, he would do the same. Refusing Harper's request for prorogation would have, sooner or not much later, prompted or even forced an election. To refuse Harper's request, then, would have invariably led to charges of partisanship and interference, and set forth a sequence of events over which the Governor General would have had no control. Bogdanor (1995) makes the point: "The consequence of rejecting advice would normally be the resignation of the government, and, even if the sovereign were able to find another government, that government would be in the office as the personal choice of the sovereign. ... No constitutional sovereign can survive for long once he or she comes to be seen as partisan" (66).

There were other reasons, some more weighty than others (but all worthy of consideration), that would have informed the Governor General's decision to accept Prime Minister Harper's request for prorogation. Dion had already promised to resign, and there was no guarantee that a new Liberal leader would accept the coalition agreement, or would be compatible with either the NDP or the Bloc. The Bloc's support of such a coalition was bound to cause that party problems among its supporters in Quebec, and would eventually have difficulties accepting the compromises such an agreement would demand. Such considerations might well have tipped the balance and convinced the Governor General that this was not the time to break a long-standing convention that governors general are supposed to accept the advice of their prime ministers, nor did the circumstances require such intervention.

Conclusion

I am aware that I am assigning the governor general to a rather passive role. Under my analysis, the governor general is to show little if no initiative, and do what she or he is asked, unless the circumstances are extraordinary, perhaps impossibly so. Not all constitutional experts share this view. Some, most notably Eugene Forsey (1964), see arguments defending such passivity as insulting:

We are sometimes told that the only safe rule is that "the Crown must always follow the advice of its ministers." Safe? Suppose Mr. Diefenbaker, on April 9, had asked the Governor General to dissolve the new Parliament forthwith. Will anyone in his senses say that the Governor would have been bound to consent, that a fresh election in such circumstances would have been "democratic"? Parliamentary government means more than just counting heads instead of breaking them. It also means using them. Are we parrots who can do nothing but repeat a phrase which, in ordinary circumstances, is a useful summary of sound constitutional doctrine, but in extraordinary circumstances may become a grotesque travesty? Or are we human beings, with brains, and the gumption to apply them? (9)

Forsey wished his governors general would show more fortitude and take charge when needed. More precisely, he wanted his fellow political scientists to support governors general when they did. But it is not lack of courage that is the problem. It is a lack of political mandate. Coupled with this is the simple fact that if governors general are to become activist, they will face off against extremely powerful prime ministers, often the very prime ministers responsible for their appointment in the first place. It should not be surprising that a prudent governor general would wish to exercise caution before becoming more involved in parliamentary and constitutional machinations. The process by which people become prime ministers ensures that most will be at least ambitious if not aggressive. It would be irresponsible

for a governor general to provoke a prime minister into escalating a stand off into a constitutional crisis. But what prime minister would shy away from such a confrontation, and what prime minister would not be convinced he or she would win? Yet, the role I identify for the governor general is nonetheless thoughtful for all its passivity. There is much to consider when contemplating the consequences of accepting or rejecting the advice of a prime minister, of determining whether a viable alternative exists, or of calculating the likelihood parliament can work things out for itself: in these deliberations the governor general can be neither a “simple head breaker” nor a naïve “parrot”.

Dion’s leadership was fragile, and his successor Ignatieff was not interested in the Coalition. In the end, the Commons was able to pass its budget, and in doing so revealed its confidence, however reluctant, in the Harper government. Hindsight is indeed twenty-twenty, but events show that the Governor General’s decision not to intervene was the right one. Furthermore, by agreeing to prorogue parliament the Governor General did manage to avoid becoming embroiled in a partisan dispute. She did not completely avoid controversy, but it is difficult to imagine a scenario in which she could have avoided it altogether. The vagaries of minority government politics placed the Governor General (and to be fair, the Prime Minister as well) into a very difficult position. However, any intervention on her part, such as refusing the request and inviting Dion to form a government, would have led to even more problems. I would agree that had Harper demanded a dissolution, the Governor General would have been within her rights to say no, and should have. But Harper did not demand a dissolution. He asked for something quite a bit less drastic and within his rights to so request. In the end, the Governor General followed the best route available to her. She did what was necessary for Parliament to work things out for itself, and it did.

Endnotes

¹. The budget was tabled January 27, 2009.

². A useful overview can be found in Aucoin et al. (2004).

³. On when these can be exercised, see, among others, Hogg (2007: 290) and Heard (1991: 26).

⁴. The Conservatives won 124 seats in 2006.

⁵. In 1984, the Liberals had won just 40 seats, or 14 per cent of the total (282). The 77 seats won in 2008 represented just 25 percent of the total (308). Note that the Liberals did not contest Central Nova, the riding in which Green party leader Elizabeth May ran (unsuccessfully).

⁶. The Liberals won 103 seats in the 2006 general election; 135 in 2004.

⁷. See Valpy (2009) and Levy (2009) for the events leading up to the decision, and their context.

⁸. Bill C-1, the Oaths of Office. The purpose of this bill, as explained by Marleau and Montpetit, is “to assert the independence of the House of Commons and its right to choose its own business and to deliberate without reference to the causes of summons as expressed in the Speech from the Throne” (chap. 8: 315). The UK equivalent is the Outlawries Bill, “a Bill which no Member presents, which has never been printed.”

⁹. Although there may have been an indication of what was to follow: Harper decided to table Bill C-1 as an actual document, rather than simply move first reading orally, a curious and unprecedented move of doubtful significance. This worried Liberal House Leader Ralph Goodale, who asked why the opposition parties were not consulted first.

¹⁰. The subamendment was moved by Bloc leader Gilles Duceppe, and read: “that the House recognize that the Speech from the Throne is unanimously decried in Quebec because it reflects a Conservative ideology that was rejected by 78 percent of the Quebec nation on October 14 and that as a result the House denounce the fact that it does not respond to the consensus in Quebec respecting, for instance, the legislation on young offenders, the repatriation to Quebec of powers over culture and communications, the elimination of the federal spending power and the maintenance of the existing system of securities regulation.” The subamendment was defeated with 238 voting against and 48 [the Bloc caucus] voting in favour. The Liberal amendment passed November 25, 2008.

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- ¹¹. As Stewart points out, however, even under minority situations “the governing party has always survived the initial parliamentary tests of confidence” (455).
- ¹². The financing of political parties through direct government grants has been controversial in Canada. See MacIvor (2005) and also Payne (1999/2000).
- ¹³. Opposition days are “allotted days,” and according to Beauchesne’s *Parliamentary Rules & Forms* (Fraser), “Allotted days are part of Government Orders and may be postponed at the discretion of the government regardless of whether a notice of motion for debate has been filed” (§918). See also Marleau and Montpetit (2000, chap. 18).
- ¹⁴. See Desserud (2006). On the constitutional problems with attempting to fix election dates under the Westminster model, see Desserud (2005, 2007). For alternative perspectives on both, see Heard (2007, 2009a).
- ¹⁵. Rae, then leader of the NDP in Ontario, had signed the famous Liberal-NDP Accord in 1985.
- ¹⁶. Had he left open the option of being a candidate in April, the Liberals would have had to appoint Ignatieff as an interim or acting leader, something it wanted to avoid.
- ¹⁷. Bill C-10, “An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures,” received royal assent March 12, 2009.
- ¹⁸. On this question, see also Forsey (1951).
- ¹⁹. Only once has Canada seen a coalition government at the federal level, the 1917 Union Government formed during the First World War. Even so, that coalition was born not of necessity but was instead a statement of unity in a time of great crisis. Sir Robert Borden’s Conservative party, which led the coalition, nevertheless commanded a majority of the seats. At the provincial level, coalition governments have been, in Dawson’s words, “not uncommon” (nt. 11: 174). But even then, examples are few and far between. Manitoba has had several in its history. So has British Columbia, Ontario and, most recently, Saskatchewan. The 1985 Ontario Liberal-NDP Accord was not a coalition government, as no NDP MPPs sat in Cabinet. On provincial coalitions, see Donnelly (1957) and also Blais (1973). For an explanation why “Canadian federal parties have not used coalition governments to resolve minority stalemates,” see Stewart (452 ff.). Peter Russell examines the politics of minority governments in Russell (2008), and also in Russell (2009: 136-49). See also Dobell. On the Liberal-NDP coalition proposal, see White (2009). Finally, for a broader study of coalitions and minority governments, see Dodd (1976).
- ²⁰. It is likely that some supporters of the Coalition assumed this scenario would play out this way as well.
- ²¹. I agree with Graham White who laments the missed opportunity for the useful reform and reconsideration of Canada’s parliamentary system that a coalition government would have afforded. See White (2009: 150-60). See also Leduc (123-35).
- ²². For example, see the editorials in the *Globe and Mail* and the *Ottawa Citizen*: “Non-binding accord” (2008) and “We chose a party (2007).”
- ²³. However, the NDP did indeed hint during the election campaign that it was open to a coalition with the Liberals. See Flanagan (2008).
- ²⁴. Professor Tom Flanagan (2009) wrote: “Together, the Liberals and the NDP won just 114 seats, 29 fewer than the Conservatives. They can be kept in power only with the support of the Bloc, whose *raison d’être* is the dismemberment of Canada.” See Grace Skogstad’s (2009) thoughtful study of why the proposed coalition was widely regarded as “illegitimate” in Western Canada.
- ²⁵. The debate whether a party wins an election, as long as it has the most seats regardless of whether or not it holds a majority, has a long history in Canada. See, for example, Angus (1952), who criticizes the public’s reaction to a coalition government in BC: “Underlying the doctrine there seems to be implicit a feeling, foreign to parliamentary government, that the people elect not only the legislature but an administration as well” (521). Ned Franks (2009: 39-41) also discusses such arguments. See also Neatby (1963). Concerning the 1925 general election, in which no party received a majority, Neatby summarizes what he takes to be Byng’s reasoning in eventually asking Meighen to form a government: “The Conservatives had won [*sic*] and it was only fair that Meighen should receive the victor’s laurels. It was Byng’s duty, as he conceived it, to award the prize” (83-84). Quoted in Stewart (1980, 454).
- ²⁶. Compare the outrage sparked by Conservative MP Belinda Stronach when she crossed the floor to accept a cabinet seat under the Martin Liberal government (May 17, 2005) to the support for Conservative MP Bill Casey when he voted against the Conservative Government. See Pammatt (2006, 29) and Joanna Smith (2008).
- ²⁷. See note 38 below. On parliament’s power to advise, see Forsey (1963).
- ²⁸. As we saw with the Liberal government under Paul Martin, who ignored a series of defeats in 2005 before he finally asked for a dissolution. See Franks (1987: 138 ff.), Desserud (2006) and Heard (2007). Of course, governments are sometimes only too happy to use a defeat in the Commons as an excuse to call an election they are confident they can win, but that is not the same thing.

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- ²⁹. What if the nonconfidence vote proceeded as planned, and Harper lost? This would have indeed been a devastating and likely fatal blow to the Harper government. However, the fatal effects of the vote might not have been felt immediately. Nor would it have had to be. In Desserud (2006) I argue that confidence votes are not the same as, for example, decisions made by a Supreme Court, in which the vote is final and the effects immediate. Instead, nonconfidence votes are indications, some clearer than others, of a serious problem with the ability of a government to command the support of the House. In any case, the penultimate decision concerning whether the result of a nonconfidence vote is fatal to the government lies with the prime minister. Had Harper lost such a vote but refused to either resign or request a resolution, he would have nevertheless remained the prime minister, at least for a while. The ultimate decision, of course, lies with the governor general, but it is difficult to say how long a governor general would tolerate such behaviour. Longer than a day, but probably not as long as a year. However, we have no precedence to guide us on this matter.
- ³⁰. The 1985 Ontario Liberal-NDP accord was not legally binding. See White (1988: 272): "It was evident, however, that the agreement enjoyed no force in law and that the rules and conventions of British parliamentary practice with respect to the crucial issue of confidence stood unaltered."
- ³¹. Public opinion polls showed the Conservatives with a substantial lead over the Liberals. See, for example, Strategic Counsel poll (2008).
- ³². Or perhaps opposition parties simply want to insert their policies into the Government's legislative agenda. But the strategy remains the same.
- ³³. With deference to Notestein (1924).
- ³⁴. The proviso is important.
- ³⁵. See Forsey (1953: 228) : "A legislature is elected to transact public business. It ought to be allowed to do so, if it can (i.e., if it can elect a speaker), unless there are strong reasons of public policy for dissolving it." See also Forsey (1968: 63 ff.). One indication that the House can do its job is when it has done its job, such as pass its supply bills (see Dicey quotation below). It would be irresponsible for the Crown to allow a dissolution, or for that matter a prorogation, before Supply had been passed, because this would mean the Government would not have access to the funds it needs to govern. This is what took place in Manitoba in 1922 when Lieutenant-Governor Sir James Aikins refused Premier T.C. Norris's request for dissolution after he was "defeated on a motion of non-confidence respecting the abolition of the Public Utilities Commission." Aikins reportedly told Norris that "the Legislature had been summoned to attend to the business of the province and when it had done so (which took about two weeks) he would dissolve it" (Bosiak 1989, 1st para). The situation is, however, a little more complicated now at the federal level in Canada. Under Canada's Financial Administration Act, the governor general, on the advice of the government, can "issue special warrants authorising expenditure not approved by Parliament" even if Parliament was prorogued or dissolved. David Hamer (2004) maintains that Canada "destroyed a vital part of responsible government" with this bill (107).
- ³⁶. An adjournment was not an option, if only because this require the consent of the House Leaders. In general, see Thomas (1982).
- ³⁷. According to Dicey (1902), the practice of passing the Mutiny Act yearly was designed to enforce certain parliamentary conventions. The act itself asserted parliament's sovereignty over the military (specifically, that a standing army can exist only with Parliament's approval). To fail to pass such a bill would, theoretically, have led to a loss of this power and perhaps a standing army beyond parliament's control. Hence parliament had to pass it every year (and did so until 1879), which meant that the convention that parliament must meet at least once a year was upheld (75). The bill was not, then *pro forma*, like the Outlawries Act or Canada's Oaths of Office, but was nevertheless a part of the conventions of parliament, and its passage an indication that a new parliament had settled in to do its work. On the history of the Mutiny Act, see Glazier (2005), and also Duke and Vogel (1960).
- ³⁸. Letters Patent Constituting the Office of Governor General of Canada (October 1, 1947): Summoning, proroguing, VI. "And We do further authorize and empower Our Governor General to the exercise all powers lawfully belonging to Us in respect of summoning, proroguing Parliament or dissolving the Parliament of Canada" (Funston 1994, 342). See also Mundell (1960-63) and David Smith (2007, 128ff.).
- ³⁹. Marleau and Montpetit (2000) write: "See Privy Council minute, P. C. 3374, dated October 25, 1935, a 'Memorandum regarding certain of the functions of the Prime Minister', which stated that recommendations (to the Crown) concerning the convocation and dissolution of Parliament are the 'special prerogatives' of the Prime Minister" (nt. 12: 310). See also Marshall (1984) who quotes Prime Minister Pearson's response to a question concerning the use of an "instrument of advice" rather than a formal "minute of Council" when advising the governor general on matters such as dissolution. Pearson replied that "the minute of Council was considered inappropriate as a means of addressing the Governor-General on those matters on which tendering of advice is the responsibility of the Prime Minister alone and not of the Committee of the Privy Council (H of C Debates, April 4,

1966)" (48). Finally, see Bogdanor (1995) who writes, "In Britain, since 1918, the convention has been that it is the prime minister, and not the cabinet, who decides to seek a dissolution" (81).

- ⁴⁰. See, for example, the variety of responses compiled in "Forum" as well as in Russell and Sossin (2009), in particular the engaging and contrasting arguments provided by Franks (2009: 33-46) and Heard (2009b: 47-62).
- ⁴¹. Heard (2007) refers his readers to "a key motion proposed in 1873, dealing with the Pacific scandal; the 1873 motion died on the order paper, with the House prorogued before a vote was taken" (nt. 13: 414).
- ⁴². To which Heard (2009b) would add that in granting the request, the Governor General set an unfortunate and dangerous precedent: "Now a prime minister can demand that Parliament be suspended whenever he or she believes that such a course might break the resolve of the opposition; the length of that suspension is also indeterminate" (60). The question is, then, which precedent was worse to set: the one Heard describes, or the precedent of a governor general refusing a constitutionally legal request from her prime minister.
- ⁴³. An anonymous reviewer pointed out that the Governor General's decision changed the political landscape; had the Governor General refused the request and appointed Dion prime minister, the Coalition would have fared better. Possibly, I would argue, however, that while the pressures within and among the three parties to maintain their agreement would be different had the coalition formed a government, they would be no weaker, and likely much stronger, than those that caused the coalition to fall apart after the decision to prorogue was made. On the viability of the proposed coalition, see Franks (2009: 37:41).
- ⁴⁴. See also Heard (1991): "It is often suggested that the proper course for prime ministers who find their advice refused by the governor is to offer their resignation" (29-30). Bogdanor (1995, 66) and Marshall (1984, 35-44) concur.
- ⁴⁵. My own belief is that, had Harper's request for prorogation been turned down, he would have either resigned immediately or demanded a dissolution. The second option would have been a means of upping the ante and provoking a constitutional crisis.

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