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What Will the 40th Parliament Be Like?

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What will the 40th Parliament be Like? When I accepted this invitation I did not realize this would be a trick question.

The paper I wrote after the election suggested that given the election outcome the 40th Parliament would be very much like the 39th. After the first week of the new Parliament I threw out that paper and did a new one entitled “Decorum is not Enough”.

It argued that while better behaviour would be a positive sign there were a number of procedural areas that had to be rethought if we were going to have a more functional parliament. I had some suggestions on how to improve Question Period, the Committee, System, and so on. After the Finance Minister gave his Fiscal Update and the Prime Minister prorogued Parliament I threw out that paper.

The new one dealt with a topic that has concerned me for some time. Watching Parliament over the last four years I often thought it is amazing that we do not have a constitutional crisis. With the prorogation of Parliament this week I think we just had one or came very close. Before looking at what happened this week I want to look back and assess the damage to our institutions by successive governments over the last few years.

The Abuse of the our Parliamentary Conventions

In April 2005 Paul Martin, facing a possible defeat, addressed the nation and took the extremely unusual step of promising to call an election within 30 days of the Final Report of the Gomery Commission. (Unprecedented to tie the calling of an election to an external event).

The opposition reacted by trying to use one of their upcoming supply days to introduce a non confidence motion in the government.

The government responded by postponing every Opposition Day until June and even undesignating one such day.

The opposition responded by trying to attach a non confidence motion to a committee report.

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This series of events led to “The Curious Case of May 10, 2005” as Professor Andrew Heard called it. After much procedural wrangling and Speakers Rulings a vote was held and the non confidence motion attached to a committee report passed by a vote of 153 in favour and 150 opposed. The government ignored this claiming it was a procedural motion.

Professor Heard and others concluded that by any meaningful definition this had been a valid non confidence vote.

All three opposition parties had stated well in advance that they believed this vote to be a test of confidence. While the wording was convoluted the content still clearly inferred that supporters of the motion were in favour of the Government’s resignation.²

The Government did hold a second and “definitive” confidence vote nine days later and it survived but only after inducing Belinda Stronach to defect

When the House resumed in September 2005 the Government once again postponed opposition days until mid-November. (Also in September Stephen Harper, Jack Layton and Gilles Duceppe wrote their famous letter to the Governor General suggesting that they were prepared to form a government if she received a request for dissolution.)

On the first opposition day, November 21, 2005 an NDP motion was carried by a vote of 167 (representing all three opposition parties) to 129. It called on the Prime Minister to wait until the week of January 2 and then ask the GG for an election to be held on February 16 so as to avoid a Christmas campaign.

The NDP motion was rejected by the Government and rightly so from a traditional point of view. You cannot at the same time say you have no confidence in the government and then ask them to stay in Office for a few more weeks or months.

But the motion does raise the question of whether Canada has taken too parochial an understanding of confidence. The Westminster model is not the only approach to making and unmaking governments. Some countries have provisions for caretaker governments after a vote of non confidence. Others require a constructive vote of confidence meaning that you cannot simply defeat a government and force an election but must also propose an alternative government.

If we are going to have more minority governments it is incumbent on our leaders to at least consider alternative ways to deal with implications arising from the parliamentary combinations that the people have elected.

A few days later the government was defeated and the election held on January 16 returned the first Harper minority.

² Andrew Heard, “The Curious Case of May 10, 2005”, *Canadian Journal of Political Science*, vol 40 June 2007, p. 412.

Fixed Date elections

The Harper government had a plan to end this constitutional improvisation. Following the lead of certain provinces³ it enacted legislation fixing the date of the next federal election for October 2009 and every four years thereafter

The decision to fix election dates was welcomed enthusiastically by those who believe the Canadian Prime Minister has too much power and that parliamentary democracy is well served by checking this power⁴. During testimony on the Bill in the House most experts felt it did not change the status quo⁵ and noted how rare it is for a government to propose an institutional measure that does not benefit itself in one way or another.

Traditionalists who appeared before a Senate Committee on the bill were much more critical. Professor David Smith argued that fixed election dates fit neither the theory or practice of parliamentary government. “Fixed election dates do not give the public greater voice in politics. In fact, the partisan motivation and potential for engineering defeats within the House shifts the focus of attention even more than at present from constituents to the party leaders in the House.”⁶

The fixed election date did not create an equal playing field. Instead it transferred responsibility from the Prime Minister to the Leader of the Opposition for setting the election date. On several occasions the Government, with an eye on the polls, challenged the Official Opposition to bring them down. Instead the Official Opposition repeatedly spoke against government bills and then abstained from voting to avoid an election.

Following the Throne Speech to start the Second session of the 39th Parliament the Prime Minister, frustrated by delays on his agenda, stated that virtually every vote on government business was going to be a matter of confidence. Again the responsibility for choosing an election date fell to the Leader of the Opposition with the same result.

The genius of parliamentary government is that it fixes responsibility in very clear and obvious ways. A Prime Minister bears ultimate responsibility for a functional or dysfunctional parliament. If it is dysfunctional he can call an election. Our fixed election date, in my view, has eviscerated this responsibility. We have the antithesis of the responsibility that a parliamentary system is supposed to achieve!.

The next unprecedented event took place in February 2008 when the House of Commons used the confidence convention to impose closure on the Senate! The Minister of Justice gave the Senate Committee studying amendments to the criminal code an ultimatum.

³ Three provinces (British Columbia, Ontario and Newfoundland) have held elections in accordance with fixed dates. All of them have single chambers and all had majority governments.

⁴ Peter Russell, *Two Cheers for Minority Government*, Emond Montgomery Publications Limited, Toronto, 2008, pp. 134-142.

⁵ Canada, House of Commons, Standing Committee on Procedure and Organization, October 5, 2007. Testimony of Henri Milner, Andrew Heard and Louis Massicotte.

⁶ Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007.

Pass the Bill by February 28 or else. He said “I do not believe I would have any choice except to advise the Prime Minister that I believe that this is a confidence measure and I will put the matter in his hands.”

Because the Senate is not a confidence chamber the next day a motion was introduced in the House calling on the Senate to report the Bill to the House by March 1, 2008 and indicating this motion was a question of confidence.

The Opposition maintained this was contrary to the principle of the independence of the two Houses⁷ However with the Liberals abstaining the motion was adopted by a large majority.

The Senate did return the Bill before March 1 thereby averting a possible crisis. This single incident can be put down to political brinksmanship but the precedent, taken to its logical conclusion has profound implications for our system of government.

Slowly some observers, Norman Spector was one of the first, came to the conclusion that the fixed election date was a mistake.⁸ Prime Minister Harper himself seems to have come to this view in August 2008 when he met with his caucus to consider the upcoming fall session. He decided to ignore the legislation and declared that parliament had become unworkable. To bolster his argument he met separately and briefly with the leaders of the other three parties and asked them for assurances they would co-operate in making parliament work during the fall session. When he failed to receive such assurances he asked the Governor General to dissolve parliament and set the election date for October 14, 2008, one year earlier than required under his own fixed election statute. No vote of confidence took place in the House.

The Financial Update Statement

That is the background to the Government’s Financial Statement which resulted in two separate issues of confidence and two more examples of problems with the confidence convention..

The first was the statement itself and the question to be asked is “How in the world did a Ministerial Statement become a matter of confidence?” Of course, the government can consider anything to be a matter of confidence and that was the clearly the impression given to the other parties. In a more procedural sense we are talking not about the statement itself but about the ways and means motion that would follow. Either way a clear message was sent that as in the last session of the last Parliament everything was going to a matter of confidence.

⁷ Canada, House of Commons, Debates, February 11, 2008

⁸ One Chief of Staff to a former Conservative Prime Minister has argued that fixed election legislation was one of the greatest mistakes of the Harper government. See Norman Spector’s column in *Globe and Mail* January 4, 2008

Properly understood a Ways and Means motion should not necessarily be a question of confidence. It is really just notice to the House that financial legislation will follow.

Surely a government is entitled to give notice to bring in any legislation it wants. Only after the legislation is debated and voted upon should the question of confidence arise and even if the legislation is defeated it may not be a matter of confidence. (Pearson precedent)

To be sure the opposition was very unhappy with the contents of the Financial Statement but in my view it was the prospect of never ending confidence motions that turned this into a political if not a constitutional crisis.

The second confidence issue came about when the Liberals said they would use the supply day scheduled for December 1 to introduce a non confidence motion. They also formed an alliance with the NDP supported in a limited way by the Bloc to make sure they had the support to form a government. They informed the Governor General of their Accord.

The government reacted by postponing the vote on the opposition day for a week. They were following the precedent set by Paul Martin on this and procedurally there was nothing wrong with that. But surely we have to ask ourselves if this is the proper way to deal with non confidence motions.

When Supply motions were originally introduced into the rules they were not even votable. They were days to be used by the opposition to discuss any matter they wanted in keeping with the tradition of Grievance before Supply. Slowly over the years a few became votable and now virtually all of them end with a vote. But supply days are scheduled by the government. It is obvious what happens when there is a non confidence motion on a supply day. It has happened twice and the results are not pretty. Desperate things are said and done as people wait for the guillotine to fall.

At most there should be a 24 hour postponement on confidence to allow all members to get to the House in time to vote but anything more than that is counterproductive. This could be achieved by a very simple change to the standing orders. But I hope it would be part of the larger issue of how we go about dealing with confidence.

When the coalition agreement was signed I threw out my paper on the confidence convention since this issue would not arise again for 18 months and wrote a paper on what to expect from the coalition.

When the Governor General prorogued parliament I threw out that paper.

The most recent paper (written last night) has no title but does contain five ideas for the next session Let me conclude with these

Five Ideas for A Better Parliament

1) I think we have seen enough to embrace the recommendation by Prof David Smith who said we need to create an independent body or Royal Commission “to study the law, conventions, usages, and customary understandings that guide parliamentary government in Canada”⁹

In one sense this has been a great week in that it has stimulated discussion about the nature of our political institutions. Some important questions have been asked about the future of our parliamentary institution and now we need to set up a blue ribbon panel to provide some answers.¹⁰ You can put that idea in the Throne Speech.

2) Lets repeal the law on fixed election dates. It does not do what it is supposed to do and symbolically it is like holding up a sign that says “I do not know anything about Parliamentary government and I could care less.” If we do not want to repeal it we need a meaningful fixed election date and that could be part of the work done by the Royal Commission suggested above.

3) The Prime Minister needs to indicate that aside from the vote on the Throne Speech and the Budget he will not consider other votes on government legislation or motions as matters of confidence.

I wish the Opposition would have asked him about this before they formed the coalition.

I hope the Governor General asked him this during their two hour interview yesterday.

I hope that will be one of the first questions in new parliament.

Because if the answer is yes (or none of your business) we will have to conclude that our Westminster style parliamentary government is now little more than a caricature.

A minority government should make a commitment to work in a co-operative way and more importantly should indicate it will accept the occasional defeat on its legislation as a legitimate expression of the will of the House (keeping in mind that once we get rid of that fixed election date, the government can always ask for dissolution and an election if it feels it is being completely blocked). That is my understanding of how the Accord would have worked. The Bloc might have voted against some Bills and they would be defeated (unless the Conservatives supported them) But the Bloc gave an undertaking they would not vote non confidence for 18months. That is how a minority should work.

4) We need a law preventing members who change parties from being appointed to cabinet. It is not necessary to rehash for this audience the two unprecedented incidents of

⁹ See David Smith, *The People's House of Commons: Theories of Democracy in Contention*, University of Toronto Press, Toronto, 2007, p. 140.

¹⁰ See for example Peter Aucoin and Lori Turnbull, Removing the Virtual Right of First Ministers to Demand Dissolution, *Canadian Parliamentary Review*, vol 27, no. 2, 2004.

party switching involving Brenda Stonach and David Emerson. The re-election of Brenda Stronach as a Liberal in 2006 and the competent work of Minister Emerson until his retirement in 2008 has put the issue on the back burner. But we should not underestimate the damage these two floor crossing have done to the institution.

They emphasized one point. -- that the only rule is that there are no rules. In the quest for power anything goes. The “end justifies the means.” That is not a good foundation on which to build sustainable democratic institutions.

With so much at stake perhaps we should not blame Ms Stonach or Mssrs, Martin, Emerson or Harper for what they did in the circumstances. But when self restraint (which is an integral part of the parliamentary tradition) fails we need to change the law so that this cannot be done again.

Ironically Canada used to have a law requiring every elected member who accepted a cabinet position to resign and run for re-election. That law outlived its usefulness and was repealed in 1931. Without suggesting a return to such a cumbersome process why not adapt that principle to the modern era to apply only to members who change party to join cabinet. At least one province (Manitoba) and one Territory (Yukon) have introduced legislation to curb this kind of floor crossing.¹¹

Federally this could be done by an amendment to the Parliament of Canada act to declare vacant the seat of any person named to cabinet who was elected to the House with a political affiliation different from the Prime Minister. The prerogative of the PM to name whoever he wants to cabinet would be unaffected. The law would have to be drafted in a way to make an exception for the possibility, (very rare in Canada until this week), of a coalition government.¹²

I see there is already a Private Members Bill by Peter Stoffer relating to party crossing but this applies to anyone who changes parties and not just those who leave to join the cabinet. It would make more sense to apply this only to members who join cabinet.

5) I would like to see a good process set up to allow parliamentarians to rethink some of our parliamentary practices. (And it must not be left to the House Leaders)

The most successful process, in my view was in the 1960s, when Prime Minister Lester Pearson specifically asked Speaker Alan Macnaughton, to take the lead in dragging the House into the 20th century.

Over the next six years Speaker Macnaughton and his successor Lucien Lamoureux coordinated the work of several sub committees on different aspects of reform. They also cajoled, challenged and probably threatened members into rethinking their House of

¹¹ See Greg Tardi, “Change of Political Allegiance in Parliamentary Life, *Perspectives in Political Law*, Distributed online and available from tardig@parl.gc.ca

¹² See David Gussow, Crossing the Floor, Conflict of Interest and the Parliament of Canada Act, *Canadian Parliamentary Review*, Vol 29 Summer 2006

Commons from A-Z. The Speakers lent credibility and wisdom to the reform process. Our Speakership (the 4 officers who preside) is a vastly underutilized cog in our parliamentary system. They are the only ones whose job encourages them to think seriously about how to improve our House of Commons not just for short term political advantage, but for the long term good of the institution.

A different process was used following the bell ringing crisis of the 1980s. First Mr. Trudeau and later Mr. Mulroney used small special committees chaired by a respected senior member on the government side -- first by Tom Lefebvre of the Liberals and later James McGrath of the Conservatives. They produced some major reforms including the election of Speaker by secret ballot.

Thanks to the McGrath committee, there is now Standing Order 51 which mandates a debate on the rules at the start of every new Parliament (between the 60th and -90th day after the opening (some time in February or March) . I hope many members will use that opportunity to put forth ideas about how this place can be improved. I hope the party leaders will encourage this and encourage the Chair to lend a hand. Obviously the Speaker cannot, on his own, decide to fix everything that is wrong with our procedures.

Conclusion

At a meeting of this Group shortly after the election of the Martin minority government another parliamentary expert, David Docherty expressed the view that a minority situation was an ideal time to rethink and improve some aspects of our parliamentary system of government.. Unfortunately there has been little interest in such thinking over the last two minority Parliaments.

Unless we are able to make our institutions work better than they have in the last two minorities I am afraid we are looking not at another King-- Byng 1926 crisis.

We are looking at something closer to what happened in the 1850s when successive elections produced deadlock because political leaders of the day failed to work together. Only after many years of chaos and with help from the British and from Nova Scotia and New Brunswick did a new entity emerge. Subsequent generations of politicians have made those institutions work and it is up to the present leaders to do the same. I hope they all reflect on this over the next 52 days.(but who is counting).