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The Canadian Political Crisis of December 2008

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“Canadians held country wide protests demanding a new election even though they had just had one. When Canadians start acting crazy, America should fit itself for a giant straightjacket.”

Time Magazine

December 29, 2008

This year marks the 160th anniversary of Responsible Government in Canada but in December 2008 Parliament was suspended after only 13 days and in the face of a non confidence motion. This article will explain the background to these events and suggest four ways in which successive governments have weakened the foundations of Responsible Government. It will conclude that even after so many years Canadians have not mastered all the subtleties of this very sophisticated form of government.

Playing Fast and Loose with the Confidence Convention

Simply stated, the unwritten confidence convention provides that if defeated in the House on a confidence question, the government is expected to resign and ask the Governor General for dissolution of Parliament and a general election. Of course a Governor General does not accede to every request for dissolution.

In her memoirs former Governor General Clarkson wrote that she would not have granted Prime Minister Paul Martin a dissolution if he had requested it during the first six months of his minority government which was elected in 2005.¹ There is nothing magical about the first 180 days. Dissolution is at the discretion of the Governor General before or after a six month period.

Similarly there is no hard and fast rule about what is a question of confidence. It is widely accepted that certain traditional motions namely the motion to adopt the Throne Speech, the motion to adopt the budget and the Appropriation Bill (Government estimates) are automatic votes of confidence.

There is less agreement on other areas related to confidence. What would happen if a government refused to resign when it had lost confidence? Does defeat of an important government bill constitute a vote of confidence? Can defeat on procedural motions be considered matters of confidence? Can a government claim to have lost confidence without being defeated in the House?²

When Paul Martin took over as Leader of the Liberal Party in November 2003 he inherited not only a majority parliament (won by Mr. Chrétien in 2001) but also a report by the Auditor General on financial mismanagement which came to be known as the sponsorship scandal. All the problems took place under the Chrétien government but Prime Minister Martin decided to launch a public enquiry headed by Justice John Gomery to get to the bottom of this. He also called a snap election for June 2004 well before the Gomery Commission could report.

The sponsorship scandal dominated not only the election campaign but the entire Martin minority parliament which began in the fall of 2004. The opposition used bodies like the Public Accounts Committee to make the point, over and over that the Liberals lacked the political, ethical or moral basis to continue to govern the country

¹ See Adrienne Clarkson, *Heart Matters*, Viking Canada , Toronto, 2006, p. 192.

² For a discussion of the confidence see Graham Eglinton and Eugene Forsey, *The Question of Confidence in Responsible Government*, Report prepared for the Special Committee on Reform of the House of Commons, 1985

In February 2005 Mr. Martin presented his first budget which appeared ready to go down to defeat, thereby triggering an election. The Martin strategy was to avoid an election until the Final Report of the Gomery Commission (scheduled for February 2006). He expected that would exonerate him personally from any responsibility for the scandal.

In April 2005 facing a possible defeat Mr. Martin 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. It was virtually 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.

Supply days were introduced in the late 1960s when the House of Commons gave up its right to endless debate on the estimates. In return a certain number of allotted or supply days are guaranteed throughout the year. On these 22 days the Opposition parties can present motions on any matter within the jurisdiction of Parliament. Originally only two of these motions could result in a vote but now most are votable. The government controls the timing of these days normally in consultation with the opposition parties.

The Martin government responded by postponing every Opposition Day until late May and even undesignating one such day. The opposition countered by trying to attach a non confidence motion to a committee report.

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 on a non confidence motion attached to a committee report. It 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.³

³ Andrew Heard, “The Curious Case of May 10, 2005”, *Canadian Journal of Political Science*, vol 40 June 2007, p. 412.

The Government did hold a second and “definitive” confidence vote nine days later and it survived but only after inducing a senior Conservative member, Brenda Stronach, to defect and take on a cabinet position in the Martin Government.

When the House resumed in September 2005 the Government once again postponed opposition days until mid-November. 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. A few days later the government was defeated on a Conservative non confidence motion and the election held on January 23, 2006 returned the first Harper minority.

The December Crisis

The precedents established in the Martin minority came back to haunt the Liberals when Mr. Harper found himself in his second minority following the October 2008 election. From the outset of the session the constant theme was the economy and what would the government do to stimulate the economy in light of the recession. The Prime Minister and the Finance Minister repeatedly told the Opposition they would get the answer in the financial update scheduled for November 27th.

In fact the update contained no stimulus and included a number of cutbacks intended to allow the government to maintain a “razor thin” surplus in the present fiscal year. It also proposed to eliminate the cash subsidy of \$1.95 per vote to political parties that was part of a major reform of electoral financing. The Finance Minister said he intended to ban strikes in the public service and revise some details of the pay equity process. He also envisaged income from the sale of government assets to maintain a surplus but would not identify which assets would be sold.

The Financial Statement raised two separate issues of confidence. First a Ministerial Statement is not normally a matter of confidence” Of course, the government can consider anything to be a matter of confidence and the clear the impression was given to the other parties that this was a matter of confidence. In a procedural sense we are talking not about the statement itself but about the ways and means motion that would follow.

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.

To be sure the opposition was very unhappy with the contents of the Financial Statement and in light of the Opposition outcry Mr. Harper reacted quickly and over the week end announced he would not proceed with the most controversial items in the update. But it was too late.

The second confidence issue arose when the Liberals said they would use the supply day scheduled for Monday December 1 to introduce a non confidence motion which, with the support of all opposition parties, would defeat the government. The Liberals also negotiated an alliance with the NDP providing for an alternative government to take over if requested by the Governor General following the defeat of the Conservatives. The new government would consist of 18 Liberals and 6 members of the NDP. They agreed to work together on a no surprise basis for two years.

However these two parties did not have enough seats to form a majority so they signed a separate agreement with the Bloc Québécois who agreed to support the coalition on confidence votes for 18 months with the possibility of extending this after that period. The Governor General was informed of the existence of this Accord.

The government reacted by postponing the vote on the opposition day for a week, until December 8. In this they were following the precedent set by Paul Martin and procedurally there was nothing wrong with that.

For three days in Question Period the Opposition attacked the Financial Statement and the Government responded by attacking the “separatist-socialist” coalition. Mr. Harper suggested the coalition gave the “separatist” Bloc a veto over the government although this was clearly an exaggeration and ignored that he had suggested a similar arrangement when he was in opposition to the Martin government. Exchanges in Question Period descended to new lows with the opposition being characterized as traitors. The Prime Minister repeatedly said he would take all legal measures to stop what he considered a kind of coup d'état.

Facing imminent defeat the Government took the unusual step of asking for Prorogation on Thursday December 4. After a meeting with the Governor General lasting over two hours the Prime Minister emerged to say the Governor General had granted this request and Parliament would return on January 26, 2009 with a new Throne Speech to be followed immediately by a Budget on January 27.

In light of events under both Mr. Martin and Mr. Harper we have to ask ourselves if there is not a better way to deal with non confidence motions.

Fixed Election Dates: A Misguided Reform

The Harper government elected in 2006 had a plan to end the constitutional improvisation of its predecessor. Following the lead of several provinces it enacted legislation fixing the date of the next federal election for October 2009 and every four years thereafter. Of course in a parliamentary system the date of an election is not absolutely fixed as it is in the United States. Elections are still required if the government loses confidence and, legally, the Prime Minister could still ask for dissolution at any time.⁴

When the Senate looked at the proposed legislation a few experts argued that this type of fixed date legislation 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.”⁵

The legislation appeared to be stuck in the Senate where the Liberals held a large majority until a public opinion poll showed the Conservatives nearing 40% support which is majority territory and rumours began to circulate that Mr. Harper intended to call a snap election to take advantage of the situation. The Liberal Senators quickly returned the Bill to the House with a minor amendment and House Leader Ralph Goodale taunted the Conservatives to accept the amendments and enact the Bill, thereby making it almost impossible for them to call an election. It was in these circumstances that the legislation was finally passed without a recorded vote.

Over the next several months the fixed election date effectively 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 Liberals 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. This

⁴ Edward McWhinney, Fixed Election Dates and the Governor General's Power to Grant Dissolution, *Canadian Parliamentary Review*, vol. 31, no. 1, spring 2008.

⁵ Professor David Smith, testimony to Canada, Senate, Standing Committee on Legal and Constitutional Affairs, February 14, 2007.

contributed to a general malaise in Parliament and several committees became completely dysfunctional as walkouts and filibusters became the order of the day.

Slowly some observers came to the conclusion that the fixed election date was a mistake.⁶ Prime Minister Harper came 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.

Although a law suit was launched against the government for violating its own fixed date election there was nothing illegal about what it did. While the election call certainly violated the spirit of the act, the opposition parties deserve some blame as well. They had supported the fixed date legislation and then when it was ignored they made no attempt to present an alternate government to finish the term. Everyone, it seems, wanted an election more than they wanted a fixed election date.

Party Switching and the “Ends Justifies the Means” Philosophy

Party discipline is the unifying principle that makes possible Westminster style responsible government. Some argue that Canadian politics suffers because party discipline is too rigid. This debate will continue whether future parliaments are majority or minority. However two recent instances of party switching relate directly to minority government and illustrate the need to re-examine certain rules and conventions.

Floor crossing is hardly a recent phenomenon. A study for the Office of the House of Commons Ethics Commissioner identified 229 party switches since 1921. The majority were related to changes in the party system which occurred in the 1920s (Progressives) the 1960s (Social Credit/Creditistes) and the 1990s (Reform/Canadian Alliance/Conservative).⁷

The defection of Brenda Stronach, a front bench Conservative and former candidate for the Leadership of that party and her immediate promotion to a senior cabinet position prompted calls from both parliamentarians and the general public for legislation to prevent such "party-hopping." Peter Stoffer of the NDP introduced a private members bill

⁶ 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

⁷ Desmond Morton, A Note on Party Switchers, *Canadian Parliamentary Review*, Vol. 29, Summer 2006.

that would require a by-election to be held within thirty-five days of such an event. The MP would have to sit as an independent until the by-election. Some Conservatives supported the bill but it was defeated by a vote of 189 to 60.

The NDP also requested an investigation of Stronach, suggesting that she had been promised a cabinet post in return for her defection. However, the Ethics Commissioner refused to investigate citing the unfettered right of a Prime Minister to appoint Cabinet ministers.

A second controversial floor crossing involved David Emerson, a former business man and civil servant who entered politics as a Liberal in the 2004 election. Minister of Industry in the cabinet of Paul Martin, he ran and was re-elected in 2006 as a Liberal in Vancouver Kingsway. The Conservatives subsequently formed the government and less than a month after the election Mr. Harper appointed David Emerson as Minister of International Trade and Minister responsible for Vancouver since the party had not elected any members in Canada's third largest city. There were few in any precedents for either the action or the negative outcry that resulted.⁸

This time the Ethics Commissioner announced he was launching a preliminary inquiry into conflict-of-interest allegations against Mr. Emerson and Prime Minister Harper. He subsequently stated he was "satisfied that no special inducement was offered by Mr. Harper to convince Mr. Emerson to join his cabinet and his party". He found no wrongdoing on Emerson's part but recommended a parliamentary debate on the issue of floor crossing

The furor should have reinvigorated support for legislation relating to floor crossings. But of course the Liberals were silent because of their previous deal with Stronach. The NDP tried unsuccessfully to get another private members bill passed. They also tried to have a measure dealing with party switchers included in the *Accountability Act* but it was rule out of order for being beyond the scope of the Bill.

The re-election of Brenda Stronach as a Liberal in 2005 and the competent work of Minister Emerson until his retirement in 2008 put this issue on the back burner. But we should not underestimate the damage these two floor crossing have done to the institution or the extent to which they violate principles central to liberal democratic institutions. This kind of "end justifies the means" philosophy is usually associated with non democratic or authoritarian states. But with so much at stake is it not naïve to blame Stronach, Martin, Emerson or Harper for what they did in the circumstances?

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 restrain members from crossing the floor to join

⁸ According to a *Globe and Mail* poll, 77% of respondents thought Emerson should step down and run in a by-election. An Ipsos Reid poll of British Columbians found that even in staunchly Conservative areas of the province, respondents were 75% in favour of a by-election being called.

cabinet. At least one province (Manitoba) and one Territory (Yukon) have introduced legislation to curb this kind of floor crossing.⁹

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 with a political affiliation different from the Prime Minister. The prerogative of the PM to name whoever he wants to cabinet would be unaffected.¹⁰

The real foundations of Responsible Government are not the constitution or the standing orders. Rather, common sense, self restraint, and the old fashion British sense of fair play are essential. Such principles have not stood up very well to the pressures of three consecutive minority governments. We need to give serious thought to the recommendation by Professor David Smith who called for an independent body or Royal Commission “to study the law, conventions, usages, and customary understandings that guide parliamentary government in Canada”¹¹

False Populism and the Demise of the Coalition

Prorogation, whether it was the right decision or not,¹² did not kill the coalition. The government could still have been defeated in January 2009 and a coalition installed without an election. The fact it did not happen was due largely to a widespread misunderstanding of the parliamentary system. As one newspaper wrote, ‘These extraordinary events suggest that our prevailing constitutional principles and values are poorly understood by the public, and easily manipulated by politicians through wild claims and rhetorical statements that generate plenty of heat but little light for the citizenry.’¹³

An example of the strategy used by the government is revealed in the following interview by the Minister of Transport on national television while he was waiting for the Governor General to come to a decision.

Hon. John Baird: And I think what we want to do is basically take a timeout and go over the heads of the members of parliament, go over the heads frankly of the

⁹ See Greg Tardi, “Change of Political Allegiance in Parliamentary Life, *Perspectives in Political Law*, Distributed online and available from tardig@parl.gc.ca

¹⁰ See David Gussow, Crossing the Floor, Conflict of Interest and the Parliament of Canada Act, *Canadian Parliamentary Review*, Vol 29 Summer 2006

¹¹ See David Smith, *The People’s House of Commons: Theories of Democracy in Contention*, University of Toronto Press, Toronto, 2007, p. 140.

¹² For different perspectives on the debate over the decision of the Governor General to prorogue parliament see Andrew Heard, “The Governor General’s Suspension of Parliament: Duty Done or a Perilous Precedent?” and C.E.S. Franks “To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?” in Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, Toronto, University of Toronto Press, 2009.

¹³ *Victoria Times-Colonist*, 8 December 2008.

governor-general, go right to the Canadian people. They're speaking up loudly right across this country in a way I've never seen them.

Don Newman: So you now think the House of Commons is illegitimate. That the Governor-General is illegitimate and-- well no. Now but John you are a Conservative. You have always been a Conservative, and you live in a British parliamentary system and in a British parliamentary system, it is only legitimate for the government to be the government if it can sustain the support in the House of Commons, and to say now you're going to go over their heads, brush them aside. They're not even important anymore. We're going to go to the people. The Governor-General isn't important.

Hon. John Baird: We live in a democracy. They're the ones that rule. They're speaking up loudly. I think there are a lot of concerns within the Liberal caucus that this is not what their constituents want, and frankly I have a lot of confidence in the Canadian people. They're speaking up loudly. They'll continue to. There will be rallies across country. E-mail petitions. I've never seen anything like this.

Don Newman: So this is Kiev a couple of years ago. Are you all going to have different coloured scarfs?

Opinion polls tended to show support for the government's argument that the coalition was illegitimate. The prospect of a national unity crisis and eventually an election fought on that basis helped to break up the coalition. When Parliament resumed in January 2009 the Liberals had a new Leader, Michael Ignatieff, as all other candidates to replace Stéphane Dion at a leadership convention scheduled for April 2009 withdrew in favour of Mr. Ignatieff. The Liberals supported the January 27 budget and the crisis was over.

According to some authors the government's strategy was part of its long term attempt to undermine traditional parliamentary democracy, "first by taking deliberate steps in the direction of populist democracy and second by creating confusion about the role of the House of Commons in sustaining and dismissing the government of the day."¹⁴

To some extent the Conservative position resembled that of its predecessor, the Western based Reform Party which argued in 1994 that the Bloc should be denied the status of Her Majesty's Loyal Opposition despite the fact they had 56 seats compared to 54 for Reform. Had the Question gone to the people no doubt the Reform position would have prevailed but House of Commons Speaker Gilbert Parent took the position that the invariable practice in Westminster Parliaments was for the party with the second largest number of seats to be invited to form the Official Opposition regardless of where they come from and what they represent.

¹⁴ Jennifer Smith, "Parliamentary Democracy versus Faux Populist Democracy", in Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, Toronto, University of Toronto Press, 2009.

This situation was more complicated for a number of reasons, including the Liberal leadership situation, but if we believe in Responsible Government we have to be prepared to go where it takes us. The events of the last few years seem to indicate that neither Canadians nor their leaders are prepared to do this. The result has been a devaluation in our form of responsible government, to the point where we might not be able to muddle through the next crisis.

We seem to have become detached from the logic and the genius of their own institutions and nothing good can come from such detachment.