

Confidence game

Playing fast and loose with parliamentary conventions has weakened responsible government

by Gary Levy

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Canada has been governed under responsible government for 160 years. It came to Nova Scotia in 1848 and – thanks in part to leaders like Robert Baldwin, Louis Hippolyte LaFontaine and Governor General Lord Elgin – to the old United Province of Canada a year later. However, if the parliamentary crisis of December 2008 is any indication, we have still not mastered all the subtleties of this very sophisticated form of government.

The prorogation (suspension) of the 40th Parliament on December 4, after it had sat for only 13 days and with a motion of nonconfidence pending, raised a number of important questions about our institutions:

- Did the government breach any fundamental, albeit unwritten, principle of constitutional behaviour?
- Was the Governor General correct to accede to the Prime Minister's request to prorogue in such circumstances?
- Was the opposition irresponsible in seeking to replace the government just two months after an election?

Many answers to these questions have been offered. But the fact that Canada found itself in this position in the first place raises a more profound question: Do we have a political class capable of sustaining Westminster-style responsible government for another 160 years? Considering what has gone on in Parliament for the last five years, one can only wonder.

The events of December 2008 are part of a longer story about failure to adapt our institutions to the recent spate of minority parliaments which began with the election of 2004. Successive leaders have played fast and loose with some basic conventions of parliamentary government, and it was only a matter of time until there was a political explosion.¹

Origins of the crisis in the Martin minority government

The story begins in April 2005 when Prime Minister Paul Martin, facing the possible defeat of his minority government, addressed the country and, in an extremely unusual step, promised to call an election within 30 days of the final report of the Gomery Commission. Tying the calling of an election to an external event was unprecedented. It outraged the opposition, which reacted by trying to use one of its upcoming opposition supply days to introduce a nonconfidence motion.

The Martin government responded by postponing every opposition day until late May, and even cancelling one such day that had already been designated. It used the extra time to continue negotiating a deal with the

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NDP and a few independent MPs for their support in return for changes to the budget. The opposition Conservatives kept up the pressure by trying to attach a nonconfidence motion to a committee report.

This series of events led to "The Curious Case of May 10, 2005," as Professor Andrew Heard of Simon Fraser University called it. After much procedural wrangling and speaker's rulings, a vote was held on a nonconfidence motion attached to a committee report. It passed, with 153 in favour and 150 opposed. The government ignored this, claiming it was a procedural motion. Professor Heard, among others, concluded that by any meaningful definition this had been a valid nonconfidence 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

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The government did hold a second and “definitive” confidence vote nine days later, after it had persuaded Conservative Belinda Stronach to defect in return for immediate appointment to cabinet. Thanks to Stronach’s vote the government survived, with the Speaker’s casting vote breaking a 152-152 tie.

Confidence was still very much on the minds of members as the House prepared to resume the next fall. In fact the three opposition party leaders, Stephen Harper, Jack Layton and Gilles Duceppe, wrote to the Governor General suggesting that they were prepared to form a government if she received a request for dissolution from Martin.

When the House resumed in September 2005, the government once again postponed opposition days, this time until mid-November. On the first opposition day, November 21, an NDP motion was carried by a vote of 167 (representing all three opposition parties) to 129. To avoid a Christmas campaign, it called on the Prime Minister to wait until the week of January 2, and then ask the Governor General for an election to be held on February 16.

The NDP motion was rejected by the government, and rightly so from a traditional point of view. You cannot at the same time imply that you have no confidence in the government and then ask it to stay in office

for a few more weeks or months. But the motion did raise the question of whether Canada takes too narrow an approach to confidence. The Westminster model is not the only approach to making and unmaking governments. Other countries have provisions for caretaker governments after a defeat or for constructive votes of confidence that require an alternative government to be named to replace a defeated one.

In any event, a few days later the government was defeated and the election was held on January 23, 2006. It returned the first Harper minority.

The first Harper minority and fixed election dates

The Harper government 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, with subsequent elections to follow 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 may still be required if the government loses confidence,

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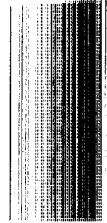
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and technically there is no legal way to prevent the Prime Minister from asking for dissolution at any time.

The proposed legislation made it through the House without a recorded vote and seemed stuck in committee in the Liberal controlled Senate, where some experts argued that fixed date legislation fit neither the theory nor the practice of parliamentary government – even though several provinces (all with majority governments) have adopted similar legislation.³ But then a public opinion poll showed the Conservatives nearing 40 per cent, and rumours began to circulate that 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 Liberal House Leader Ralph Goodale taunted the Conservatives, daring them to accept the amendment and enact the bill, thereby making it almost impossible for them to call an election.

The bill was adopted, again without a recorded vote, after the Senate amendment was defeated. Over the next several months it effectively transferred responsibility for setting the election date from the Prime Minister to the Leader of the Opposition. On several occasions government spokespersons, with an eye on the polls, challenged the official opposition to bring them down. Instead the Liberals, led by Stéphane Dion, repeatedly spoke out against government bills but then abstained from voting to avoid an election.

Following the Throne Speech to start the second session of the 39th Parliament in October 2007, Prime Minister Harper, frustrated by delays in implementing his agenda, indicated

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, and with the same result.

In February 2008 the government used the confidence convention, in effect, to impose closure on the Senate! The Minister of Justice gave the Senate committee studying amendments to the criminal code an ultimatum: either pass the bill by February 28 or else. Because the Senate is not a confidence chamber, a motion was introduced in the House calling on the Senate to report the bill to the House by March 1, 2008, and indicating that this motion was a question of confidence.

The opposition maintained that this was contrary to the principle of the independence of the two houses. 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 brinkmanship, but the precedent, taken to its logical conclusion, has profound implications for our system of government.

Slowly some observers were coming to the conclusion that the fixed election date was a mistake.⁴ 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, declaring 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 that they would cooperate in making it work during the fall session. When, as

might have been expected, 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 statute. No vote of confidence took place in the House.

The abbreviated first session of the 40th Parliament

Following the election, the new Parliament met in November 2008, and a speaker was elected. The Throne Speech expressed a more cooperative attitude, and was adopted without division and with a minor amendment proposed by the official opposition. In Question Period the constant theme was the economy. What would the government do to stimulate the economy in light of the impending recession? The Prime Minister and the Finance Minister told the opposition that they would get their answer in the Economic and Fiscal Statement scheduled for November 27.

The statement surprised many. It contained no stimulus and instead 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 but would not indicate which assets would be sold.

The Economic and Fiscal Statement raised two separate issues related to confidence. One is technical. A ministerial statement is not, in itself, a matter of confidence, though of course the government can consider anything 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. But a ways and means motion, properly understood, should not be a question of confidence either. 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 on should the question of confidence arise, and even if the legislation is defeated it may not be a matter of confidence.

In light of the opposition outcry and with the possibility of losing a vote on the ways and means motion, Harper reacted quickly and announced he would not proceed with the most controversial items in the Economic and Fiscal Statement. But it was too late.

The second confidence issue arose when the Liberals said they would use the opposition day scheduled for Monday, December 1, to introduce a nonconfidence motion. In a matter of days a Liberal-NDP agreement was signed, providing for a government of 18 Liberals and six NDPers. They would work together for two and a half years. The Bloc Québécois was not part of the coalition but agreed to support the agreement and not vote nonconfidence for 18 months, with a possible extension at the end of this 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. It was following the precedent set by Paul Martin on this, and procedurally it was on solid ground.

For three days in Question Period the opposition attacked the Economic and Fiscal Statement and the government attacked the "separatist socialist coalition." On December 4, facing imminent defeat, the government took the unusual step of asking for prorogation of a session that had just started, with a nonconfidence motion on the Order Paper.

After a meeting lasting more than 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.

The prorogation, the change in Liberal leadership one week later (Michael Ignatieff replacing Stéphane Dion), a report that Harper "will no longer threaten elections to force opposition compliance on secondary policy matters"⁵ and the adoption of the January 27 budget with support from the Liberals at least temporarily put an end to the parliamentary crisis. Indeed, its fizzling out into nothing seems to validate the claim of those who say that there was never a crisis, only a drama.

But what about the questions that were posed at the outset?



Did the Governor General make the right choice?

Constitutional authorities and Canadians in general are divided on the question of whether the Governor General was correct in accepting the request for a prorogation. Defenders of the Governor General point out that the essence of responsible government is that the Crown acts only on advice of the prime minister. The prime minister must accept sole responsibility for the decision to suspend Parliament, and it will be up to the Canadian electorate to pass judgement on this choice. For the Governor General to have refused advice would probably have led to Harper's resignation and, as in the 1926 King-Byng affair, a constitutional crisis in which the vice-regal role would have been front and centre.

On the other side are those who argue that the primary responsibility of a governor general is to protect against any abuse of power by a prime minister. The obligation to accept advice relates only to any *constitutionally valid* advice, not any and all advice a prime minister

might offer. Was it not a fundamental abuse of power to shut down a newly elected Parliament at the moment when it was poised to vote nonconfidence in the incumbent government? Did it not set a bad precedent?

The debate over the decision will rage for years, but even more worrisome was the government's attack on the legitimacy of the proposed coalition government.

Was the opposition irresponsible?

The Prime Minister's first reaction to the announcement of a coalition was to call it an "undemocratic seizure of power." Other Conservatives called it a "coup." Their argument rested partly on the recent election results, which gave the Conservatives the most seats (but 12 short of a majority). But it also zeroed in on the coalition's need to secure votes from the Bloc Québécois to retain the support of the House. Repeated accusations of giving the separatists a blank cheque seemed to have the desired effect in much of the country, especially among western Canadians, who would have had very few seats in a Liberal-NDP coalition government.

The new Conservatives sounded much like the old Reformers when, in 1994, they called for the Bloc being denied the role of official opposition despite having the second largest number of seats in the House (two more than Reform). Popular opinion may have supported that position, but the Speaker of the House followed parliamentary tradition and accorded the office to the leader of the second largest party, regardless of what that party stood for.

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Jennifer Smith of Dalhousie University refers to the Conservative position as "false populism," which consists of "taking deliberate steps in the direction of populist democracy and creating confusion about the role of the House of Commons in sustaining or dismissing the government of the day."¹⁰ An example of this is the following exchange, which took place on national television during the two hours the Governor General was meeting with the Prime Minister. Transport Minister John Baird defended the government's position that a coalition depending on support from the "separatists" was illegitimate:

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

DON NEWMAN: So you now think the House of Commons is illegitimate. That the Governor General is illegitimate ... 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.

JOHN BARRD: We live in a democracy. They're the ones that rule. They're speaking up loudly. I think there is a lot of concern 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 the country, email petitions. I've never seen anything like this.

DOX NEWMAN: So this is Kier a couple of years ago. Are you all going to have different coloured scarves?

One western editorial well described the situation: the events of December 2008 revealed 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."⁸

Hope springs eternal

The demise of the coalition combined with the current economic recession does not augur well for any meaningful parliamentary reform in the coming months or years. However, in the hope

that some members of the present Parliament or the next one might see the importance of taking a serious look at reform, I will conclude with a few suggestions of where to start.

We need a law to prevent members who change parties from going directly into cabinet. We need not rehash the two incidents of party switching involving Belinda Stronach (in the midst of a nonconfidence motion) and David Emerson (two weeks after being elected); their retirement has put the issue on the back burner. But we should not underestimate the damage these two floor crossings did to the institution. They revealed that the only rule is that there are no rules: in the quest for power anything goes.

The end justifies the means is not a principle on which to build sustainable institutions.

Ironically, Canada used to have a law requiring every elected member who accepted a cabinet position to resign and run for reelection. That law outlived its usefulness and was repealed in 1931. Without returning to such a cumbersome process, we could adapt that principle to the modern era to apply only to members who change parties to join 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 to the House with a political affiliation different from that of the prime minister. The prime minister's prerogative to name whomever he wants to cabinet would be unaffected. The law would have to be drafted in a way to make an exception for

the possibility (still very rare in Canada) of a coalition government.

More generally, we need to allow parliamentarians (it must not be left to the House leaders) to rethink some of our parliamentary practices. The most successful process took place in the 1960s, when Prime Minister Pearson 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 subcommittees on different aspects of reform. They also cajoled, challenged and probably threatened members into rethinking their rules and practices from A to Z.

The speakers lent credibility and wisdom to the reform process. The speakership (the four officers who preside) is a vastly underutilized cog in our parliamentary system. These officers are the only ones whose job predisposes 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.

Many of our standing orders were designed for majority governments and make less sense in a minority. If such a reform process could be initiated, there is no shortage of areas that should come up for reconsideration.

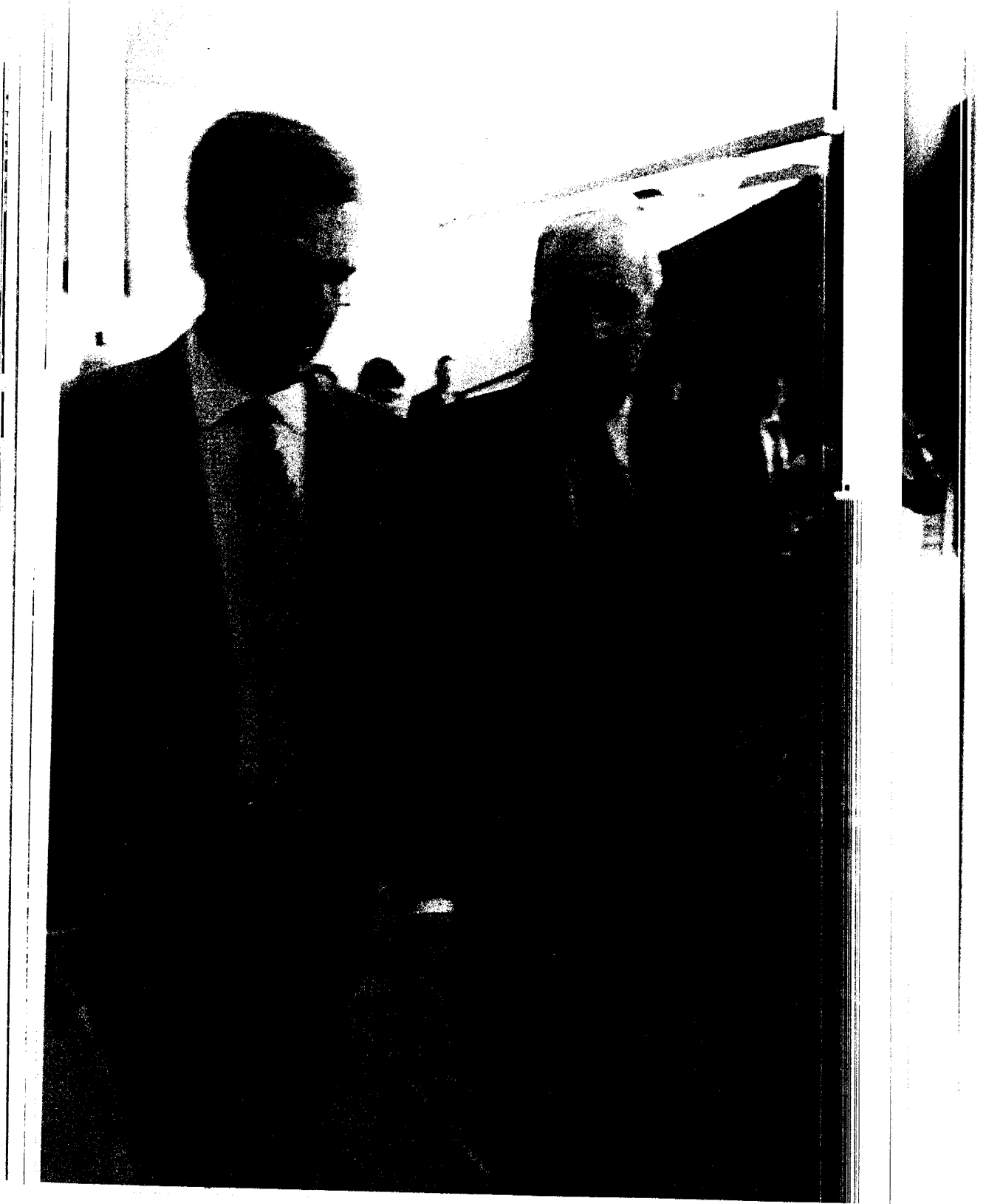
These include Question Period, the legislative process, financial procedures, the use of time, private members' business and, of course, the process for moving nonconfidence.

The committee system alone could keep a reform commission busy for years. In the first Harper minority, half a dozen chairpersons were deposed and nearly a hundred of their decisions overturned – more than in all previous parliaments combined! Investigations were carried out without care for reputations, as some committees used their parliamentary privileges in highly questionable ways. Despite this, the current Harper minority operates with the same committee system and the same rules.

Beyond this, in view of the constitutional machinations of the last four years, we need to give serious thought to the recommendation by Professor David Smith of the University of Saskatchewan for an independent body or Royal Commission “to study the law, conventions, usages, and customary understandings that guide parliamentary government in Canada.”¹⁰ Profound questions have been raised about the future of our parliamentary institutions and we need to set up a blue-ribbon panel to provide answers.

One such question concerns the fixed-date election law. The government is being sued for not following the law in 2008, and a recent bill

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introduced by Senator Lowell Murray seeks to repeal the fixed election law.

The power to dissolve Parliament is really part of the Royal Prerogative (Clause VI of the 1947 Letters Patent of the Governor General). Such power is not easily codified, but consideration should be given to having the Letters updated to provide that when there is a fixed election date the governor general cannot accept a prime minister's request for dissolution unless it comes after a vote by the House.

The real foundations of responsible government are not the constitution, the Letters Patent or the standing orders. Rather, common sense, self-restraint and the old-fashioned British sense of fair play are essential. Without these qualities – and they have been largely absent from our parliamentary institutions for some time – we are left with little more than a caricature of parliamentary government.

Fifty years ago Canada had four minority governments in a decade. The first two (1957–58 and 1962–63) were largely dysfunctional. The last two (1963–65 and 1965–68) modernized the functioning of the House of Commons. Let us hope that the chaos of the last two and a half minorities will not be repeated in the remainder of the present one. There is still time in this Parliament to

repair some of the damage done to our most important democratic institution.

Notes

¹ For a longer discussion of the background see Gary Levy, "A Crisis Not Made in a Day," in Peter H. Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis: The Challenges, Choices and Future of Parliamentary Government in Canada* (Toronto: University of Toronto Press, in press).

Andrew Heard, "The Curious Case of May 10, 2005," *Canadian Journal of Political Science*, Vol. 40 (June 2007), p. 412.

² Testimony of Professor David Smith to the Senate Standing Committee on Legal and Constitutional Affairs, February 14, 2007.

³ See Norman Spector's column, *Toronto Globe and Mail*, January 4, 2008.

⁴ *Toronto Globe and Mail*, January 8, 2009.

⁵ Jennifer Smith, "Parliamentary Democracy versus Faux Democracy," in Russell and Sossin, eds., *Parliamentary Democracy in Crisis*.

CBC Newsworld, transcript of interview with John Baird, December 4, 2008, 10 a.m.

⁶ *Victoria Times-Colonist*, December 8, 2008.

⁷ See Greg Tardi, "Change of Political Allegiance in Parliamentary Life," *Perspectives in Political Life*, available from tardig@parl.gc.ca

⁸ David Smith, *The People's House of Commons: Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007), p. 140.