

## 2 A Crisis Not Made in a Day

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The origin of the December 2008 parliamentary crisis is variously attributed to a conspiracy among opposition parties to overturn the results of the 14 October election, a devious plot by Prime Minister Stephen Harper to weaken the opposition, or an inadequate, unacceptable, and overly ideological economic statement by the finance minister on 27 November 2008.

This chapter argues that the unusual prorogation of Parliament by the governor general after thirteen sitting days and in the face of a non-confidence motion was really the culmination of repeated abuse of the most important principle of responsible government, the confidence convention. The crisis forces us to reflect upon whether we still have Westminster-style responsible government in any meaningful sense.

### **Playing Fast and Loose with the Confidence Convention**

Simply stated, the unwritten confidence convention provides that, if defeated in the House of Commons on a confidence question, the government is expected to resign. The prime minister may ask the governor general for dissolution of Parliament and a general election but, of course, the governor general does not have to accede to every such request. In her memoirs Governor General Adrienne Clarkson wrote: 'The question arose during Paul Martin's minority government of whether or not I as Governor General would grant dissolution and allow an election to be called if the prime minister requested it. After considering the opinions of the constitutional experts whom I consulted regularly, I decided that, if the government lasted six months I would allow dissolution. To put the Canadian people through an election be-

fore six months would have been irresponsible, and in that case I would have decided in favour of the good of the Canadian people and denied dissolution.<sup>1</sup>

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 always constitute a vote of confidence? Can procedural motions be considered matters of confidence? Can a government claim to have lost confidence without being defeated in the House?<sup>2</sup> The failure of successive minority parliaments, starting with Paul Martin's, to find the right answers to these questions led to the December 2008 crisis.

When Martin took over as leader of the Liberal Party in November 2003, he inherited not only a majority Parliament (won by Jean Chrétien in 2001) but also a report by the auditor general on a case of financial mismanagement which came to be known as the sponsorship scandal. All the problems had occurred under the Chrétien government but Prime Minister Martin decided to launch a public inquiry headed by Justice John Gomery to get to the bottom of the affair. 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.

In February 2005 Martin presented his first budget, which appeared ready to go down to defeat. The Martin strategy was to avoid an election until the final report of the Gomery Commission (scheduled for February 2006). He expected that this report would exonerate him personally from any responsibility for the scandal. Thus, in April 2005, Martin addressed the nation and took the extremely unusual step of promising to tie the next election date to an external event. He said that he would call an election within thirty days of the Gomery Commis-

sion's final report. The opposition parties were aghast at this idea and decided to use one of their upcoming supply days to introduce a non-confidence motion in the government.

On 18 April the Official Opposition gave notice of a motion that, if adopted, would have designated dates for the remaining six opposition days, the timing of which is exclusively within the purview of the government. Martin responded by postponing every opposition day and the government house leader went as far as to undesignate an opposition day that had already been set. To counter this manoeuvre, the opposition tried to attach a non-confidence motion to a committee report and then moving concurrence of that 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 Speaker's 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 the vote, claiming that it was on a procedural motion only. Yet 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.'<sup>3</sup>

The government did hold a second and 'definitive' confidence vote nine days later and it survived, but only after inducing Belinda Stronach to defect from the Conservative Party, thereby creating a 152-152 result which was broken by the casting vote of the Speaker. When the House resumed in September 2005, the government once again postponed opposition days, this time until mid-November. (Also in September 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.)

On the first opposition day, 21 November 2005, a New Democratic Party (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 2 January and then ask the governor general for an election to be held on 16 February 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 it 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.

In any case, a few days later, on a Conservative opposition day, the government was defeated on a simple non-confidence motion. The election was held on 23 January and returned the first Harper minority government.

### **Fiddling with a Fixed Election Date**

The Harper government had a plan to end the constitutional improvisation of its predecessor. Following the lead of certain provinces,<sup>4</sup> it enacted legislation fixing the date of the next federal election for October 2009 and every four years thereafter. Of course, none of these provinces had minority governments or bicameral chambers. But it was not a matter of simply underestimating the complexity of federal politics. The fixed election date was smoke and mirrors from the very beginning.

First, in a system of responsible government, the date of an election cannot be 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.<sup>5</sup> The law explicitly stated that nothing in it 'affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.' More important was the cynical way in which the law was adopted and used. The Official Opposition was reluctant to agree to the legislation although it was eventually passed in the House of Commons. The Liberal-dominated Senate appeared ready to hold it up indefinitely in committee. Witnesses who appeared before a Senate committee, including Professor David Smith, argued that fixed election dates fit neither the theory nor the 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.'<sup>6</sup>

In March and April 2007 polls suggested the Conservatives were surging ahead of the Liberals, even in the crucial province of Ontario.

Rumours abounded that the prime minister was about to call an election. Candidates were told to be ready and election machines were put into gear. The Liberals, unprepared for an election, promptly returned the fixed-date election bill from the Senate to the House with a minor amendment adding 'referendums' to the clause that allows the chief electoral officer to change the date in case of a conflict with a provincial or municipal election or with a day of 'cultural or religious significance.' The government rejected the amendment and, when the Senate decided not to insist, the law came into effect in May 2007.

It soon became apparent that the new legislation did not create an equal playing field as suggested by its proponents. Instead, it basically transferred the responsibility for setting the election date from the prime minister to the leader of the opposition. On several occasions, the government, with an eye on the polls, challenged the Official Opposition to bring it down. Instead, the Liberals 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 stated that virtually every vote on government business was going to be a matter of confidence. The result was more abstentions by the Official Opposition. The government, for its part, even took the unprecedented step of using the confidence convention to impose closure on the Senate. On 6 February 2008 the minister of justice appeared before the Senate Legal and Constitutional Affairs Committee studying an omnibus amendment to the Criminal Code. He gave the committee an ultimatum. Pass the ~~fixed-date election~~ bill by 28 February or else. '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.'

Of course, the Senate is not a confidence chamber. The defeat of a bill by the Senate does not bring down the government, although past governments have used defeat or delay by the Senate as a reason for calling an election.<sup>7</sup> That would be much harder to do with a fixed-date election law. So the next day a motion was introduced in the House calling on the Senate to report the bill to the House by 1 March 2008. The opposition maintained that this motion was 'subversive of everything we have done under our Constitution involving two Houses in this Parliament ever since day one.'<sup>8</sup> However, with the Liberals abstaining, the motion was adopted by a large majority.

The Senate did return the bill before 1 March, thereby averting a possible constitutional crisis. This single incident can be put down to pol-

itical brinksmanship but the precedent, taken to its logical conclusion, has profound implications for our system of government.

Some observers, such as Norman Spector,<sup>9</sup> suggested that the idea of fixed election dates was a mistake. Prime Minister Harper himself 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 cooperate in making Parliament work during the fall session. When he failed to receive such assurances, he declared that Parliament had lost confidence in his government and asked the governor general to dissolve Parliament and set the election date for 14 October 2008, one year earlier than required under his own fixed-date election statute. No vote of confidence took place in the House.

A court challenge was launched against the prime minister for breaking his own law although, in a purely legal sense, there was nothing wrong with what he did.<sup>10</sup> The initial days of the campaign were characterized by much criticism of the prime minister for violating the spirit if not the letter of his fixed-date election law. But this criticism needed to be set alongside the fact that the three opposition parties (all of whom claimed to support the legislation and had voted for it) did not even consider proposing to the governor general an alternative government to serve out the remaining year of the mandate envisaged by the fixed-date election statute. Nor did the governor general suggest to the prime minister that, in light of the fixed-date election legislation, he needed an expression of the House's will before he could claim that there was no confidence in his government.

### **The Financial Statement of 27 November and Its Aftermath**

That is the background to the government's financial statement of 27 November 2008, which resulted in two separate issues of confidence and two more examples of how some politicians seem to have lost sight of the way our institutions are supposed to work. The first confidence issue was the economic statement itself, and the question to be asked is how in the world a ministerial statement came to be a matter of confidence. Of course, the government can consider anything to be a matter of confidence and that was the clear 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. But, properly understood, every 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 financial legislation is defeated it need not be a matter of confidence.

To be sure, the opposition was outraged by the contents of the financial statement. Since the election, the opposition had been told that all its questions about a fiscal-stimulus package would have to wait for the financial statement. But in fact there was no stimulus in the statement. Instead, there were proposals to limit public subsidies to parties, introduce a ban on public-service strikes, change the pay-equity process, and sell government assets to raise money, none of which had been mentioned in the election campaign. Facing an outraged and united opposition, the government agreed to withdraw the objectionable items. But it was too late. Beyond the proposals or non-proposals in the financial statement, the prospect of never-ending confidence threats had turned the parliamentary battle into a political and a constitutional crisis.

The second confidence issue came about because the Liberals, being unwilling to abstain as they had in the last Parliament, said that they would use the supply day scheduled for 1 December to introduce a non-confidence motion. They also formed an alliance with the NDP, supported in a limited way by the Bloc Québécois, to make sure they had the support to form an alternative government. The opposition parties then informed the governor general of their accord.

The government reacted by postponing the vote on the opposition day for a week. In doing so, it was following the precedent set by Paul Martin and procedurally was on solid ground. But surely we have to ask whether 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.' Supply days were to be used by the opposition parties to discuss any matter they wanted, in keeping with the tradition of 'grievance before supply.' Slowly over the years, a few supply motions 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.

Before the non-confidence motion could come to a vote, Prime Minister Harper asked the governor general to prorogue Parliament, thus ending the first session and eliminating the non-confidence motion. The correctness of this decision is discussed elsewhere and will be debated for years.<sup>11</sup> But it was not the governor general's decision as much as the government's logic that is really worrying.

During the more than two hours it took the governor general to come to a decision, the following exchange took place between CBC journalist Don Newman and Transport Minister John Baird, who defended the government's position that a coalition depending on support from the 'separatist' Bloc Québécois would be 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 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.

*John Baird:* 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 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?<sup>12</sup>

The government had essentially returned to arguments used by the



Reform Party in 1994 when it suggested that the Bloc Québécois should be denied the role of Official Opposition despite having the second-largest number of seats in the House and two more than the Reform Party. 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 and where it came from.

### Lessons Learned

The prorogation, the change in Liberal leadership the next week, the report that Prime Minister Harper 'will no longer threaten elections to force opposition compliance on secondary policy matters,'<sup>13</sup> and the adoption of the budget introduced on 27 January appear to have ended this parliamentary crisis. But events of the last few months and years should be a wake-up call to those who want to preserve a Westminster-style parliamentary system.

The first lesson we should draw is that, if we are going to have more minority governments, it is incumbent on our leaders to find ways of dealing with implications arising from the parliamentary combinations the people elect. Failure to do so could result not in another King-Byng crisis of 1926 but something more like the political stalemate of the 1850s when successive elections produced deadlock because political leaders of the day failed to work together. Only after years of chaos and with help from the British and from Nova Scotia and New Brunswick did a new entity emerge with different political institutions. Today, few men and women go into politics because they are interested in parliamentary institutions, so perhaps it is time to embrace Professor David Smith's recommendation for the creation of an independent body or royal commission 'to study the law, conventions, usages, and customary understandings that guide parliamentary government in Canada.'<sup>14</sup>

Second, we should either repeal or change the fixed-date election law. It has done no good and much harm. Other parliamentary democracies have considered ways to limit the prime minister's unfettered right to dissolve Parliament.<sup>15</sup> Perhaps that is another question that could be considered by the proposed royal commission.

Third, we need better procedural ways to deal with non-confidence motions instead of piggybacking them onto supply days where they can be delayed by the government. This essentially new procedure has

not served the public interest on at least two occasions in the last four years.

A change to the standing orders on this matter would invite changes to other rules. Unfortunately, procedural reform has not been a high priority for many years. We have been entrusting this task to House leaders who are really concerned with short-term political strategy rather than with the long-term health of Parliament. We need a better process to review the standing orders, preferably one that involves the presiding officers, as was the case in the 1960s when Prime Minister Lester Pearson specifically asked Speaker Alan Macnaughton to take the lead in dragging the House into the twentieth 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 House of Commons. The Speakers lent credibility and wisdom to the reform process. Our Speakership (the four officers who preside) is a vastly underutilized cog in our parliamentary system. The Speakers are the only ones whose job encourages them to think seriously about how to improve the House of Commons for the long-term good of the institution and the country and not merely for short-term political advantage.

The fourth and final lesson has been expressed in one way or another by just about every student of Parliament except those directly associated with the current government. As Michael Prince of the University of Victoria puts it: '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.'<sup>16</sup>

Peter Russell and others suggest elsewhere in this volume that the legitimacy of our institutions is based ultimately on the informed consent of the governed. We all have a long way to go if we are to have both a political class and a population capable of sustaining responsible government for another 160 years.

#### NOTES

- 1 See Adrienne Clarkson, *Heart Matters* (Toronto: Viking Canada, 2006), 192.
- 2 For a discussion of the issue of 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.

- 3 Andrew Heard, 'The Curious Case of May 10, 2005,' *Canadian Journal of Political Science*, 40, no. 2 (2007): 412.
- 4 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.
- 5 Edward McWhinney, 'Fixed Election Dates and the Governor General's Power to Grant Dissolution,' *Canadian Parliamentary Review*, 31, no. 1 (2008): 15-16.
- 6 Canada, Senate, Standing Committee on Legal and Constitutional Affairs, 14 February 2007.
- 7 The most famous case was the Senate's handling of the Canada-U.S. Free Trade Agreement which led to the 1988 election.
- 8 Canada, House of Commons, *Debates*, 11 February 2008.
- 9 *Globe and Mail*, 4 January 2008.
- 10 See Guy Tremblay, 'The 2008 Election and the Law on Fixed Election Dates,' *Canadian Parliamentary Review*, 31, no. 4 (2008-9): 24-5.
- 11 See Andrew Heard's chapter in this volume and also his article 'The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?' Centre for Constitutional Studies, Discussion Paper no. 7, January 2009.
- 12 CBC Newsworld, Transcript of Interview with John Baird, 4 December 2008, 10:00 a.m.
- 13 See *Globe and Mail*, 8 January 2009.
- 14 See David Smith, *The People's House of Commons: Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007), 140.
- 15 See Peter Aucoin and Lori Turnbull, 'Removing the Virtual Right of First Ministers to Demand Dissolution,' *Canadian Parliamentary Review*, 27, no. 2 (2004): 36-9.
- 16 *Victoria Times-Colonist*, 8 December 2008.