The Theory and Practice of Prorogation

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The unprecedented prorogation of the First Session of the 40th Parliament on December 4, 2008, after only 13 sitting days and in the face of a non-confidence motion focused attention on this obscure and normally non-controversial parliamentary procedure. For several weeks politicians, scholars and journalists debated the twin issues of whether Prime Minister Harper was justified in asking for prorogation and if so, whether Governor General Jean was correct in granting it. Such questions go to the heart of responsible government and have been answered differently by different persons reflecting the unwritten nature of the conventions that underlie our constitution. This paper will summarize the various arguments but will not dwell on the December 4 request and decision. Rather it will suggest that this prorogation was the culmination of several trends that have twisted our procedures to the point where we may want to reflect upon whether we still have Westminster-style parliamentary institutions.

1. THE DEBATE OVER DECEMBER 4, 2008

The consensus of expert opinion is that the governor general made the "right" decision in accepting the Prime Minister's request for prorogation. Ned Franks,[1] for example, argues that the essence of responsible government is that the governor general acts on the advice of the Prime Minister and there were no precedents to refuse a request for prorogation. He points out how her decision was complicated by a rapidly deteriorating economic situation, and a coalition led by an opposition leader who had been defeated and resigned only weeks before. He also noted that support of the coalition by a party dedicated to the breakup of Canada had inflamed passions in some parts of the country to the point where the population could have supported a decision that would have had profound consequences for parliamentary government. Much more logical, he argued, to take a "time out", allow passions to cool and hope that traditional cool headedness and common sense would prevail when the Second Session opened in January 2009.

A very different view of the governor general's decision was presented by Andrew Heard. He argued that the governor general is an integral fail-safe mechanism in the parliamentary system — an independent official who has the duty, on

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1 See C.E.S. Franks, "To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?" in Peter Russell & Lorne Sossin, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) at 33–46. See also "The 2008 Prorogation Question" (2009) 2 Journal of Parliamentary and Political Law at 205–213.

rare occasions, to ensure and protect the proper functioning of the institution. "The governor general has a duty to act on any constitutionally valid advice, not any and all advice a prime minister might offer."[2] He argued that the Prime Minister's decision to suspend parliament was unconstitutional and an abuse of power. The governor general could and should have refused. Instead, he concluded, she created a precedent whereby any future Prime Minister can claim to be entitled to suspend Parliament at any time, for any reason. The governor general, he says, has gutted parliament's ability to exercise its most important duty (to vote confidence or non-confidence in the government) in a timely fashion.

My view is somewhat in between — it was certainly a bad precedent but we are unlikely to ever see the exact same conditions. The crisis was really about our failure to have adequate rules for dealing with non-confidence motions and, as I have argued elsewhere,[3] this could be addressed fairly easily by a few changes in the Standing Orders.[4] The Quebec National Assembly has recently amended their Standing Orders to define, for the first time, what is non-confidence and to set out in detail how it shall be dealt with. At the federal level the rules seem to be made up as we go along and the events of December 2008 were a direct result of this.[5]

2. A SHORT HISTORY OF PROROGATION

Prorogation is part of the British parliamentary inheritance transferred to Canada. Its roots go back in English legal history, to medieval times and the constitutional balance first effectively struck between and the King and the Barons in the Magna Carta.[6] It evolved by trial and error during the struggle for power between the Crown and the early Parliaments over succeeding centuries. In the early years,

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2 See Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?" in Peter Russell & Lorne Sossin, *Parliamentary Democracy in Crisis*, *supra* note 1 at 52.

3 See Gary Levy, "A Crisis Not Made in a Day," in Peter Russell & Lorne Sossin, *Parliamentary Democracy in Crisis*, *supra* note 1 at 19–29. The issues include Paul Martin's ill-advised attempt to fix an election 30 days after the Gomery Report; his refusal to accept defeat over a non-confidence motion he claimed "procedural", his postponing of Opposition Days to avoid non-confidence motions, the floor crossing of Belinda Stronach on the eve of a non-confidence vote that ended in a tie, and of course Prime Minister Harper's abrogation of his own fixed election legislation by proclamation that the 39th Parliament was dysfunctional.

4 See Gary Levy, "The Confidence Game" (2009) 25 InRoads 48–59.

5 For example, in order to ensure a non-confidence vote in the fall of 2009, the opposition reverted to a convoluted temporary amendment to the standing orders in June 2009 to provide that the first opposition day in the fall shall be between the ninth and thirteenth sitting day after the commencement of the supply period; that no fewer than four and no more than seven days shall pass between each allotted day; and that the last allotted day shall not be more than seven sitting days before the last sitting day in the supply period.

6 See Edward McWhinney, "The Constitutional and Political Aspects of the Office of the Governor General" (2009) 32:2 Canadian Parliamentary Review 2–8; and Bruce Hicks, "British and Canadian Experience with the Royal Prerogative" (2010) 33:2 Canadian Parliamentary Review 18–24.

prorogation became a powerful weapon to be used by the King against the Parliaments. These were called into session to approve the tax revenues exacted for purposes of the King's foreign wars; but were then promptly prorogued because the King had no desire, once prorogation had occurred, to go back to Parliament and to have to justify ways in which the monies were spent and results obtained from those wars.

By the seventeenth century, with the transition from the Tudors to the Stuarts, prorogation seemed to become a convenient legal device for bringing to an end otherwise interminable Parliamentary sessions. The Long Parliament, first convened in 1641 under Charles I, dragged on through the ensuing Civil War and the Protectorate, to the eventual Restoration under Charles II in 1660. It was succeeded by a Restoration Parliament that lasted almost as long.[7]

By the time parliamentary institutions were established in Canada, prorogation had acquired a routine character, with a Ministry requesting and receiving the grant as a non-discretionary function of the Head of State. It was customary to indicate, in the grant instrument itself, a time duration for the closing down of both Houses of Parliament in this way; but this was attenuated, in its practical consequences, by a further developed practice, on the call of the Ministry in power at the time, to postpone or otherwise vary or modify, by a further Ministerial decree, the date originally fixed in the original grant of prorogation for the recall of Parliament. "The perfunctory, routine, non-discretionary character of the grant of prorogation at the request of the head-of-government is amply evidenced in the developed practice of "old" and "new" Empire or Commonwealth countries operating under Westminster-model constitutional systems."[8]

3. CANADIAN PRACTICE AFTER CONFEDERATION

The constitution simply stipulates there must be one session of Parliament per year but is silent on how long or short that may be. Each session begins with a Throne Speech and ends with prorogation. For a century after Confederation, the tradition was to have annual Throne Speeches. The normal cycle was for Parliament to open in January or February. It would sit until May or June and then prorogue until the following year. Fall sittings were infrequent and sessions rarely lasted more than 100 sitting days. As the House began to sit year-round, the average session became much longer reaching a maximum of 609 sitting days in the first session of the 32nd Parliament which lasted from 1980 to 1983.

During the first 20 Parliaments there were 88 sessions and 84 prorogations. In the last 20 Parliaments there have been 51 sessions and only 34 prorogations. Since 1957 there have been 39 sessions but only 23 prorogations. Part of the change can be attributed to minority parliaments (eight since 1957), but aside from the frequency of prorogation there has been a dramatic change in the effect of prorogation.

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7 The *Triennial Act of 1694*, 6 & 7 Will. & Mar., c. 2, limited Parliamentary terms to a maximum of three years; however, in 1716 this was changed to seven years where it remained until the *Parliament Act of 1911*, 1 & 2 Geo. V, c. 13, which reduced the limit to five years.

8 Edward McWhinney, *supra* note 6 at 4.

4. REINSTATEMENT OF BILLS AFTER PROROGATION

The principal practical effect of prorogation is to terminate business of a session. All unfinished business was dropped from the Order Paper and all committees lost their power to transact business. Bills that did not receive Royal Assent were terminated and disappeared from the Order Paper. This makes prorogation part of a rational planning for the parliamentary agenda. Business is introduced in a Throne Speech and debated for a certain time. At the end of the time, business is over and starts afresh with a new Throne Speech in a new session. The logical time frame for a session is one year which provides for the government to present a new work plan for Parliament every year. In the event that a government finds itself blocked or faced with unpalatable legislation, prorogation provided a means for the government to wipe the slate clean and start over.

In fact, the Parliamentary cycle has not worked like this for a long time as various governments have found inventive means to undo the effect of prorogation. When Allan MacEachern was House Leader in the 1970s, he sought some technical means to avoid losing some bills that had not made their way through the House even after a session that had lasted more than a year.

In October 1970, he introduced a motion to allow a bill on the Federal Court that had been considered and amended by the Justice Committee in the previous session to be deemed introduced, read a first time, read a second time, referred to and reported by a standing committee and placed on the Order Paper at report stage for debate in the new session. He obtained all party support for this idea. Even NDP rules expert Stanley Knowles went along and in due course the bill was adopted.

Four years later the Liberal government asked that two bills, one providing funds for the Canadian National Railways and Air Canada and another amending the *National Parks Act* be revived from the previous session. Both the 1970 and the 1974 reinstatements were done early in a new session. In late July 1977, Mr. MacEachern tried another tactic. The second session was coming to an end and three bills were obviously going to die. So he proposed a temporary amendment to the Standing Orders that would disappear at the end of the Parliament. It provided that these three specific bills be brought forward to the third session and be deemed to have received second reading and be referred to the appropriate Standing Committee — one to Fisheries and Forestry, one to Transport and Communications. The other bill had already passed committee stage so it was deemed to be at report stage. Since the Standing Orders were temporary, once they expired there was no record of how or why these bills were brought back.

A variation on this approach was used following the infamous bell-ringing crisis which suspended parliamentary business for two weeks in 1982. In the aftermath, a detailed agreement was worked out between the parties and put in a temporary standing order. It included a provision that the agreement would continue if interrupted by prorogation.

The Progressive Conservatives came to office in 1984. Two years later, Don Mazankowski asked for and received unanimous consent for three bills to be reinstated. Two were deemed to have had second reading and were sent to legislative committee. The other was deemed to have been considered by a legislative committee with amendments and put down for consideration at report stage. However, when the Conservatives tried to reinstate six bills in 1991, the Opposition balked. As a result, Speaker John Fraser was asked to rule whether bills could be reinstated

by a majority vote rather than by unanimity. He said they could, but suggested there need be a separate vote for each bill. Two of the most eloquent voices in opposition to this way of proceeding were Paul Martin and Peter Milliken, currently Speaker of the House.

The Liberals returned to power in 1993 and in their second session they too wanted to reinstate several bills. The first item of government business in the second session was a motion to "facilitate the conduct of the business of the House." It included a mechanism for reinstatement of both government and private members' bills. Under this mechanism, a member could introduce a bill during the first 30 sitting days of a new session and request that the new bill be reinstated at the stage to which it had progressed at the time of prorogation. Should the Speaker be satisfied that the bill was the same as the previous one, he or she could then order it reinstated at the appropriate stage.

Herb Gray argued that this was a different procedure than the one the Conservatives had used in that it did not deal with specific bills. He also pointed out that the Reform Party had previously tried to get all private members' bills reinstated. After a long discussion, the government moved to cut off debate and the new mechanism was adopted.

This mechanism was refined in October 1999 when Don Boudria brought in two separate motions, one allowing Ministers to bring back government bills in the first 30 days of the session and the other allowing private members to do the same for their bills. This time there was no closure and the NDP even joined the Liberals in supporting the motion. As a result, six government and eleven private members' bills were brought back to life.

A few years later, Standing Order 86.1, which ensures that prorogation has no practical effect on Private Members' Business, was adopted. The List of Private Members' Business, established at the beginning of a Parliament, and the order of precedence, continue from session to session. Private members' bills and motions need not be reintroduced in a new session as they automatically are deemed to have passed all stages completed in the previous session and retain the same place on the Order Paper.

The most recent development regarding reinstatement after prorogation occurred in October 2002 when a government motion added several new twists. It set out the 30-day reinstatement procedure for government bills. It also reinstated evidence from the last session with regard to committee work, authorizing the Standing Committee on Finance to travel for its pre-budget consultations. The same motion also reconstituted the special committee on the non-medical use of drugs. The opposition was unhappy with this omnibus approach and Speaker Milliken ruled that the motion would have to be split and voted on separately. Once again the government moved to cut off debate and the motions passed.

All these changes occurred during majority parliaments and to say these were of major interest would be a vast overstatement. But this pattern of playing fast and loose with the rules has been exacerbated in a minority Parliament.

5. LIFE IN MINORITY PARLIAMENT

In theory there are many good things about a minority parliament. A sloppy government cannot count upon its majority to bring back to life all the legislation that it may have lost because of a prorogation. Nor can it routinely impose time

allocation to push through its agenda. Indeed minority government presents an opportunity for members to try to reform the rules without the heavy hand of government calling the shots.

Procedures could be developed to balance the interests of government and opposition with an impartial referee in the middle. It may well make sense to allow bills to be brought back after prorogation but if that is the case, why not follow the example of the Scottish Parliament and completely do away with prorogation?

Or why not take a more serious approach to scheduling and the use of time? The number of Bills introduced in Parliament could be reduced by some tough chairmanship of the Prime Minister over the various cabinet committees. Legislation that is not announced in the Throne Speech could be made subject to a requirement for an extraordinary majority before it could be introduced. That would encourage shorter sessions and discourage governments from introducing new measures at the end of a session and then bringing them back to life in the subsequent session. Time limits could be negotiated for all bills with the Speaker having greater influence in areas where there is no agreement among the parties. With such reforms we might be able to re-establish something resembling a parliamentary cycle with prorogation returning to its traditional role as an end to the cycle. The traditional approach would help bring some order to an inherently difficult process like governing. What is not passed by the end of the session would be lost and that would be the end. Everyone should have to work and behave with that in mind and take the consequences. Of course there is no prospect of such reforms in the near future, but most of them are used in other parliaments and one wonders why we cannot have some creative thinking in our system.

The December 2008 prorogation must be seen against the "the end justifies the means" attitude that has been developing for some time. The Westminster system relies on some unwritten conventions that are little more than agreement among gentlemen as to how to behave. In recent years successive governments have gone to extreme lengths to remain in power including ignoring defeats and majority votes of the House, violating the spirit of their own fixed election date laws, enticing members to cross the floor and join cabinet to avoid defeat. In such an atmosphere, is it a surprise that prorogation was used for a purpose for which it was never intended? As former Deputy Speaker Bill Blaikie observed even before the 2008 prorogation:

> Parliament is not a soap opera. Nor is it a football match and certainly it must not become a kind of ultimate fighting where absolutely anything goes. At the moment our Parliament is very much driven by a sense of revenge. "You exaggerated what we did now we are going to exaggerate what you did." And on it goes. Surely, at some point someone has to forgive and we move on. The cycle of revenge must be broken[9].

6. POSTSCRIPT: A SECOND CONTROVERSIAL PROROGATION

A few weeks after the present article was written for a conference in November 2009, Prime Minister Harper prorogued Parliament once again, this time with a

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9 Bill Blaikie, "Reflections on Reforming Parliament" (2008) 31:3 Canadian Parliamentary Review.

telephone call to the Governor General on December 30, 2009. Instead of returning to work on January 26, the House would reconvene for a new session on March 3, 2010. The reason given for this prorogation was that the Government needed time to "recalibrate" and prepare for a new session although, as the opposition parties pointed out, most items introduced at the start of the session were still before Parliament. The Government also noted the upcoming Winter Olympic Games in Vancouver. The Opposition suggested that the real reason for the prorogation was the committee hearings being conducted by the special committee on Afghan detainees with allegations that the Canadian government had knowingly turned over prisoners to be tortured by Afghan officials. A secondary reason, according to the Opposition, was the desire to make additional Senate appointments that would give the Government enough seats to stop some of the supposed obstruction it had been facing in the Upper Chamber.

In any event, unlike 2008, there were plenty of precedents for this kind of short-term manipulation of the parliamentary schedule for the convenience of the government and the 2009 prorogation should not have raised any significant constitutional issues. However, when combined with the earlier prorogation it provoked a backlash against the abuse of Prime Ministerial power and set into motion a series of events that could lead to changes in the way prorogation is handled in Canada.

Andrew Coyne was one of the first to express outrage at the prorogation, and in his blog he urged Canadians to take action to force the members back to work.[10] The idea was taken to heart by a graduate student in the Department of Anthropology at the University of Alberta. Christopher White started a Facebook page entitled "Canadians Against Proroguing Parliament" and attracted 226,000 members in a matter of days.[11]

Some 175 professors of law, political science, philosophy and other disciplines signed a letter "Against the Prorogation of Parliament" published in several newspapers across Canada on January 11, 2010. It stated:

> The Prime Minister is not only making cavalier use of the discretionary powers entrusted to him in our Parliamentary system, but in so doing he is undermining our system of democratic government. . . . Given the short-term, tactical, and partisan purposes served by prorogation, and given the absence of any plausible public purpose served by it, we conclude that the Prime Minister has violated the trust of Parliament and of the Canadian people. We emphasize moreover that the violation of this trust strikes at the heart of our system of government, which relies upon the use of discretionary powers for the public good rather than merely for partisan purposes.[12]

An ad hoc coalition organized a series of protest rallies across Canada. On January 23, in the dead of winter, an estimated 5,000 people attended a "No Proro-

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10 See Christopher White, "Why Andrew Coyne inspired me to start an anti-prorogation Facebook group" *Hill Times* (1 March 2010).

11 See Christopher White testimony in Standing Committee on Procedure and House Affairs, *Minutes of Evidence and Proceedings* (6 May 2010) at 1.

12 See *Ottawa Citizen* and *La Presse*, 11 January 2010. For more information on the letter, see Daniel Weinstock testimony in Standing Committee on Procedure and House Affairs, *Minutes of Evidence and Proceedings* (6 May 2010).

gation" rally on Parliament Hill with smaller rallies held in cities across Canada and even in some U.S. cities having large concentrations of Canadians.

On January 20, the leader of the NDP, Jack Layton, said his party would introduce legislation to limit the power of prorogation so the Prime Minister cannot abuse it. On January 25, the Liberal Party issued a press release proposing to amend the standing orders of the House of Commons to restrict the Prime Minister's power to request prorogation.

An EKOS poll found that 52 percent of Canadians disapproved of the action and only half that number approved.[13] More significantly, the Conservative Party's lead over the Liberals, which had been as high as 15 points in October 2009, fell to less than 5 points.

Amidst the outpouring of abuse on the government, some experts did point out that prorogation was part of the Royal Prerogative and attempts to constrain it could be difficult and might even be unconstitutional.

> While circumscribing the power of prorogation may be feasible from a legal standpoint, it may not necessarily be desirable in the Canadian context. It is a doctrinaire view of the pre-eminence of the elected Commons that suggests a government is wrong to suspend the Commons' proceedings. . . . In our inherited federal and provincial systems, the government has certain features that encourage cooperation among elected members. Its main power is, of course, the ability to dissolve Parliament and appeal to the public. The tools available to the government to control the work of Parliament, including prorogation, also help to maintain equilibrium. . . . Of course, the government can abuse the powers given to it under the Westminster tradition of parliamentary government. However, it runs the risk of losing public support and provoking a conflict among elected members that the public will be called on to arbitrate. Politicians are fully responsible for all actions they take to assure the functioning of the State. If Prime Minister Harper had known how the Canadian public and the media would react, he might not have prorogued a second time — and he will certainly exercise this power with greater caution in the future. Canada's system of government will not improve by handcuffing the government or unbalancing the parliamentary system.[14]

Discussion of the prorogation decision dominated the spring session of Parliament from the time it resumed until adjournment on June 17. Numerous questions, Members' Statements and two Opposition supply days were devoted to the topic of prorogation.

On March 17, 2010, the New Democratic Party moved that," in the opinion of the House, the Prime Minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation." Although the motion was adopted by a vote of 139 - 135 it was not legally binding. While having some moral status in future cases it could hardly be considered a

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13 EKOS Poll, 7 January 2010.

14 See Guy Tremblay, "Limiting the Government's Power to Prorogue Parliaments" (2010) 33:2 Canadian Parliamentary Review.

constitutional convention since the Prime Minister and the entire cabinet had voted against the motion.[15]

Every time the government sought to move legislation forward it was denounced for having wasted weeks of parliamentary time through its prorogation. Perhaps symbolically the final day of the spring session was spent discussing a Liberal motion to set up a special committee to undertake an immediate study of prorogation. However, this motion was defeated as the Committee on Procedure and House of Affairs had authorized a study of exactly this issue on March 11. It had already heard from sixteen witnesses including the Law Clerk of the House of Commons, various present and former professors as well as other experts.

A survey of the testimony to the Procedure Committee reveals at least six options recommended by different witnesses and under consideration by the committee. Among these are the status quo which presumably now includes the non-binding resolution of March 17.

A second option would be to establish a convention for the future use of prorogation by having the four party leaders sign a letter as to what they understand proper practice to be and how they intend to deal with prorogation in the future.

A third option would be to change the Standing Orders to provide that the House of Commons must be given notice and agree to prorogation or to limit the time for which the House may be prorogued. Related to this is the idea of adding to the Standing Orders some disincentives to discourage a government from proroguing without the agreement of the House.

A fourth possibility would be a constitutional amendment establishing sessions of Parliament by statute thereby eliminating the practice if not the theory of prorogation. Such an amendment would only require the consent of the Parliament.

A fifth possibility would be an amendment specifically limiting the Prerogative of the Governor General and therefore requiring the consent of all provinces.

7. CONCLUSION

When Parliament adjourned for the summer, and with elections rumoured for the near future, it was still unclear which, if any, of these options would be recommended by the Procedure and House Affairs Committee to deal with the fallout from the controversial prorogations of 2008 and 2009.

Whether the Harper Government will pay the ultimate price for its double prorogations remains to be seen. It would be unusual for an election campaign to turn on considerations of parliamentary reform. However, the opposition parties are preparing to try and make abuse of power the ballot question.

Perhaps the most salutary effect of our two year (and counting) obsession with prorogation is that whatever the committee reports and whatever the electorate decides, governments will likely no longer behave on the assumption that the electorate cannot distinguish between a prorogation and a perogy. Even if everyone does not fully understand the fine points of parliamentary procedure, there clearly is a point where Canadians become concerned about the integrity of their institutions.

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15 See testimony by Peter Russell to the Standing Committee on Procedure and House Affairs, *Minutes of Evidence and Proceedings* (29 April 2010).

Herein may lie a first step to restoring some legitimacy to a parliamentary system that has not adapted well to three consecutive minorities.