JOHNSON SHOYAMA GRADUATE SCHOOL OF PUBLIC POLICY

Who Killed Parliamentary Government?

Presented by Dr. Gary Levy
Editor, Canadian Parliamentary Review

January 11, 2011
1:30 pm to 3:00 pm

Please note: This lecture will take place in Saskatoon and will be video-conferenced to a Regina audience.

Saskatoon Location:
Studio B (Lower Level), Education Building
University of Saskatchewan Campus

Regina Location:
JSGS Window Room, 2nd Floor, Gallery Building
University of Regina, College Avenue Campus

While every generation laments "The Decline of Parliament," Dr. Gary Levy argues that events during the last three minority Parliaments have gone beyond decline, raising questions about whether our Westminster style Parliamentary Institutions are worthy of the name. In his presentation, Dr. Levy will argue that following significant reforms of the 1960s, various practices and procedures have developed which have undermined some of the principles that formed the basis of parliamentary government. If this is the case, who is to blame? And what can be done to return Parliament to its rightful place as our most important democratic institution? If not, what are the public policy implications of a permanently dysfunctional Parliament?

Dr. Gary Levy has been a longtime student of Parliament since he was first introduced to the subject during his undergraduate days in Saskatchewan by professors like Norman Ward, David Smith and John Courtney. He is also a graduate of Carleton and Laval Universities and has taught Political Science at the University of Western Ontario and Ottawa University. However, most of his career has been spent on Parliament Hill, first as a researcher with the Library of Parliament, then as an advisor to committees on procedural reform in the early 1980s and constitutional reform during the Meech Lake era. Dr. Levy has been Editor of the Canadian Parliamentary Review for more than 25 years. He is author of many articles on parliamentary government in the Review and in other publications.

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Who Killed Parliamentary Government?

By Dr. Gary Levy
Editor, *Canadian Parliamentary Review*

Paper prepared for

The Johnson-Shoyama Graduate School of Public Policy

Lecture Series

University of Saskatchewan and Regina University

January 11, 2011

Who Killed Parliamentary Government?

The title for this presentation was inspired by the 2006 documentary film "Who Killed the Electric Car?" It looked at the development, production and subsequent dismantling of a perfectly good electric car invented in the 1990s. Of course the electric car is making a comeback and perhaps Parliament will as well.

The presentation was also inspired by a comment from David Smith at a lecture in Ottawa a few years ago. His said that if there were ten things wrong with Parliament, procedure is not one of them.

Over a short period of time we have seen a non-confidence vote ignored, a prorogation in the face of another non confidence motion and a fixed election date fiasco. We have seen committees descend into chaos and parliamentary privilege used as a club rather than a shield. Investigations were conducted without care for reputation or due process.

So despite our great debt to Professor Smith for his work on Parliament I am going to disagree somewhat with him and try to show that procedure can be important.

Some Preliminary Observations on Procedure and Conventions

In discussing procedure we should remember that our present House of Commons was basically re-invented in the 1960s. You would not recognize the House that existed in 1960. There was no Question Period as we now understand the term, no standing committee system, no private members' business, no time allocation procedure except closure.[1]

So, two preliminary points about procedure. First, the Standing Orders were not been handed down from antiquity. They were invented by modern men and women and if there are problems we should not hesitate to address them. Second in 60 years I expect many of our present rules will look as antiquated as the procedures of the 1950s look to us now.

I will also discuss conventions which are more difficult. They do go back many centuries and are the basis of the form of government we inherited from Great Britain. What are the absolute minimum requirements for a Westminster style parliamentary government?

It is a very flexible concept based ultimately on adherence to certain, often unwritten, practices such as the confidence convention. Agreement over these norms and a willingness to follow them is what mainly characterizes this form of government. Departure from these norms is not illegal (since they are not written) but should certainly be considered as unethical.

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[1] For a study of House of Commons before the 1960 reforms see W.F. Dawson, *Procedure in the Canadian House of Commons*,, University of Toronto Press, Toronto, 1962. The best study of the 1960 reforms is John Stewart's The *Canadian House of Commons, Procedure and Reform*, McGill-Queen's University Press, Montreal and London, 1977.

There is much talk these days about individual ethics. My concern is that we may face a more fundamental ethical issue which was nicely summarized in a recent book with the provocative title *Against Reform*. The author John Pepall says:

> We have forgotten how and why our political institution came to be... We are distracted by the spectacle of American politics. Most importantly we misunderstand democracy and, in the hope of getting what we think people want, risk losing control of government.[2]

He looked at a wide variety of reforms including electoral reform, Senate reform, initiative, recall and so on. I will focus more narrowly on certain procedural reforms made during a time of majority government and which have not worked in a minority situation. Then I will look specifically at the last three minority parliaments and suggest we have been pushing the boundaries of what is possible in a Westminster style system.

The Seeds of Dysfunction (The Trudeau Years)

Pierre Trudeau's most famous comment about Parliament was that MPs are "nobodies" when they are 50 yards away from Parliament Hill. We do not need to analyze his one liners too carefully but let us look at some things that happened on his watch, starting with Question Period.

Question Period

Television was introduced in the Chamber in 1977[3] Hailed as a major reform even under the stringent guidelines that were adopted, it did impact the behaviour of members in some superficial ways.

They started applauding instead off banging their desks They moved around to fill in seats and most significantly they refined their skills at the short, pithy comments that would make the nightly national news.

Some have attributed the deterioration of decorum to the introduction of cameras. They have even called for the removal of TV[4] Others suggest the answer is more cameras with fewer restrictions so that anything and everything that happens in the House can be shown.[5]

More thoughtful observers have pointed to another change that took place during the Trudeau years. When Madame Sauvé was Speaker in 1980 the party whips told her they wanted to change the practice of members being chosen by the Speaker to ask a Question.

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[2] John Pepall, Against Reform, University of Toronto Press, Toronto, 2010, p. 3.

[3] For a contemporary account of the introduction of television see James Jerome, *Mr. Speaker*, McClelland and Stewart, Toronto, 1985.

[4] See for example Yaroslav Baran and Graham Fox, Fixing Parliament, from Committees to QP: A Conversation about Parliamentary Reform. *Policy Options*, September 2010, pp. 79-82.

[5] "How to Fix Question Period" *Toronto Sun*, October 4, 2010.

Instead the Whips would give the Speaker a list and the order for individuals to be recognized.[6] This, they argued, would make for better television and a more productive Question period. Since that time the party leaders have had total control of Question Period. If you have a question of particular interest to your constituents you must convince the party leadership to be put on the list.

Since most members know in advance that they will not be participating in Question period but are merely spectators they behave as spectators do at sporting events -- by cheering their favourite team and heckling the opponents.

When the present Speaker ran for re-election at the start of this Parliament, five other candidates ran against him and every single one promised to bring better decorum to the House. None could say how.

It has fallen to Michael Chong, a government backbencher, to put forth a proposal to fix Question Period. First he wants to give back to the Speaker the ability to choose who to recognize. If more members were striving to catch the Speaker's eye, so the argument goes, there would be less heckling.

One articulate defender of the status quo is a former member, Sheila Copps, who, when she was in opposition, was a master of the art of Question Period. She argues that members run on the basis of party, are elected on that basis and the entire parliamentary institution is organized around the concept of party. To replace co-ordinated party strategy by random local questions from 150 individual members would not, according to her, be an improvement in the way Question Period works.[7]

Any attempt to wrestle control of Question Period away from the leadership will require a revolt on the part of backbenchers when the issue is taken up in committee. The prospect for such a revolt is slight.[8]

Mr. Chong also proposes a British style Prime Ministers Question Time whereby the Prime Minister alone takes questions one day a week with the other ministers present on a rotating basis. Personally I would like to see a move in this direction if only because it would end one objectionable recent trend.

Mr. Harper normally only takes questions from the Party Leaders. I am sure there are young people in Ottawa who think this is the way Question Period has always worked. This recent practice (and I not sure if it was Mr. Martin or Mr. Harper or even Mr. Chretien in his later years who started it), is certainly more demeaning to ordinary members than Mr. Trudeau's offhand comment.

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[6] Michael Chong, The Increasing Disconnect Between Canadian and Their Parliament, *Policy Options*, September 2010, p. 25.

[7] See Sheila Copps, *Hill Times*, September 20, 2010.

[8] For discussion around the Chong proposal see "What to Do About Question Period: A Round Table, *Canadian Parliamentary Review*, vol 33, no. 3 (Autumn 2010) pp. 2-8. Also Jay Hill, Reflections on Reforming Question Period, *Canadian Parliamentary Review*, vol 33, no. 4 (Winter 2010) pp. 2-4 and Glen Pearson, Some Personal Thoughts on Question Period, *Canadian Parliamentary Review*, vol 33, no. 4 (Winter 2010) pp. 5-6.

We do not want the Prime Minister to take every question every day. But I think the British practice would be a good compromise.

A similar idea was proposed by Mr. Trudeau in the 1970s but the Opposition worried what would happen when the appropriate minister was not in the House. This objection had more appeal when the House sat for ten months a year. But with so many break weeks now I do not see how this can be taken as a serious obstacle.

A greater problem is the fact that in Britain (unlike Canada) members must give advance notice of all Questions. Many say this makes our Question Period more spontaneous and lively. Perhaps, on occasion, but more often I think the old Supreme Soviet must have been more spontaneous. So many of our members read prepared questions and ministers recite prepared answers often ones not even related to the question!

Fixing Question Period would not save Parliament but given its symbolic importance it is a good place to start.

Let me now show how some seemingly minor procedural changes ended up having some major consequences. One example is prorogation which started to change under Mr. Trudeau.

Redefining Prorogation.

The principle practical effect of prorogation is to terminate the business of a session. All unfinished business is dropped. Prorogation was part of a rational planning for the parliamentary agenda.

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. Part of the change can be attributed to longer sessions and to minority parliaments but beyond that various governments found inventive means to undo the effect of prorogation.[9]

In 1970 House Leader Allan MacEachern, one of the sharpest minds in the Trudeau cabinet, sought to avoid losing a Bill that had not made its way through the House even after a session that had lasted more than a year. He introduced a motion to allow the bill to be **deemed** introduced, read a first and second time and placed on the order paper for third reading in the new session.

A similar process was used again in 1974 for several bills. Both these reinstatements were done early in a new session. In 1977 Mr. MacEachern tried another tactic. The second session was coming to an end and several bills were going to die.

So he proposed a temporary amendment to the Standing Orders that would bring certain bills back in the next session. The government had a majority and the bills were re-instated. When

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[9] See Gary Levy, The Theory and Practice of Prorogation, *Journal of Parliamentary and Political Law*. Vol 4, No. 2, 2010, pp 239-248

the standing orders were reprinted the bills were back and the amended standing order had expired and disappeared. Quite a magic trick!

The Bells Crisis which suspended parliamentary business for two weeks in 1982 was resolved by a temporary standing order which included a provision that the agreement would continue if interrupted by prorogation.

When the Conservatives came to power in 1984 they also used the deeming technique to bring back bills after prorogation. In 1993 the Liberals took this a step further by introducing a motion to "facilitate the conduct of the business of the House" Under this mechanism during the first 30 days of a new session any member could request that a bill be reinstated from the last session. Again the government moved to cut off debate and the new mechanism was adopted.

This was refined in 1999 when the government brought in two separate motions, one allowing Ministers to bring back government bills; the other allowing private members to bring back theirs.

A few years later all Private Members' bills were made permanently immune from the effects of prorogation. They are all brought back in a new session after prorogation. That is still the Rule.

I will discuss the 2008 prorogation crisis later but my point here is that when the logic of a procedure is distorted beyond recognition it is only a matter of time until it is used for some completely different purpose.

In 2008 the Government sold the idea that prorogation is really just a "time out". This sporting analogy is a strange one since I know of no sport where only one team can call a time out.

Let's look at some other examples of how procedure is evolving and how changes during the majority parliaments of Brian Mulroney and Jean Chrétien led to dysfunction when we had minority.

The Siren Call of Democracy: The Mulroney/Chretien Years

Majority Government is a blunt instrument. In fact the original role of Parliament had nothing to do with government. The role of Parliament, the House of Commons in particular, was and is support and scrutiny. It can make or break a government. It can expose failings but it cannot develop policies, choose people, administer programs, and do all the other work of governing.

Yet when members run for office they think of themselves as US style legislators. They quickly become disappointed with the limited legislative role of an individual MP. This sense of frustration was captured by the 1985 Report of the Special Committee on Reform of the House of Commons. (McGrath Committee).

The report's theme is summarized in the very first sentence "to restore to private members an effective legislative function, to give them a meaningful role in the formation of public policy

..."[10] It envisaged a tilt toward a kind of governance where elected members are true legislators and a more democratic legislature where all members, not just the Cabinet, take responsibility for what happens.

One example of the McGrath committee thinking was the proposal to elect the Speaker of the House by secret ballot of all the Members instead of being handpicked by the Prime Minister.

I will argue later that this reform has not produced the kind of Speakership that we need but it was a successful reform in the sense that it works equally well in a majority or minority context. Not so for many other changes, starting with the supply process

Grievance before Supply

The ancient principle of "Grievance before Supply" refers to the right of Parliament to demand an accounting from the King before it voted money for his wars. The modern Supply process in Canada was completely reformed in 1968. The House gave up its right to hold up supply. Instead all estimates are referred to standing committees and deemed adopted even if they have never been considered.

In return for giving up this right to delay the estimates the Opposition was allotted 22 supply days spread throughout the year where they choose the topic of debate. Originally only two of these days could end with a vote on an opposition motion.

The Reform Party felt very strongly that all these motions should be votable and as a result of changes in 1998 and 2005 nearly all of these supply days now end with a vote.

In a majority situation it is very rare for opposition motions to be adopted. In the Martin minority and the first Harper minority more than half of the opposition day motions were actually adopted by the House, usually against the wishes of the government. [11]

Among motions adopted are ones calling on the government to

- reinstate the mandatory long form census
- sell back to families land that was expropriated for Mirabel Airport,
- respect the Kyoto targets,
- amend the Competition Act relating to gasoline prices and so on.

Newspapers have taken to calling these "non binding votes" whatever that means. It is perhaps satisfying to the sponsors and to the opposition parties to have their supply motions adopted by the House of Commons but what is the average citizen to think when he reads that Parliament has voted to do something and then nothing is done.

Of course if a so called non binding vote on one of these opposition days includes the words "non confidence" it will bring down the government.

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[10] Special Committee on Reform of the House of Commons, *Report*, Ottawa, June 1985, p. 1

[11] See Louis Massicotte, Le gouvernement Harper contrôle-t-il les Communes?, *Le Devoir*, August 11, 2008

I will discuss how we should deal with non confidence in a moment but my point here is that making votable all Supply Days has not enhanced parliamentary democracy but has helped to make a mockery of it. It is a step in the direction of a kind of European Parliament where the members discuss and adopt reams of resolutions which are not binding on the constituent nation states.

More in the spirit of parliamentary government are the so called take note debates that were introduced in the 1990s.

These allow a Minister, after consultation, to propose a debate that solicits the views of Members on some aspect of government policy. The debate continues until no Member rises to speak or until four hours have passed, whichever is earlier. At the end of the debate no vote is taken.

The idea that more voting leads to more democracy and a better parliament is also seen when we look what has happened to Private Members' Bills.

Private Members Business

The McGrath committee outlined general unhappiness with the way private members' legislation was treated and proposed certain changes that were adopted over several Parliaments.

Traditionally these bills had to be disposed of within a one hour period or else they were dropped. As a result only the most innocuous bills that had unanimous consent of all members could become law. Bills did not come to a vote. They were simply "talked out."

The most one could accomplish was to give a bit of publicity to an idea and hope that it might generate some support in the country and eventually be picked up by the government.

Over the next decades numerous changes have been made to the process.

- All bills were made votable.
- Different voting system that does not start with the party leaders.
- Even Private Members' Bill that impose a charge on the public purse can now be discussed up until third reading when the Speaker will rule if they need a royal recommendation
- Committees to which bills are sent are required to report them back within 60 sitting days (no such provision exists for government bills).
- And previously mentioned Private Members Bills do not disappear with prorogation.

These changes have not satisfied private members but they have given rise to some questionable practices during the last three minority parliaments.

The Private Member's Bill to eliminate the Gun Registry was an example of the Government using a PMB to promote its own agenda and yet completely sidestep responsibility when the opposition parties defeated the Bill.

A couple of amendments to the criminal code were passed using private members bills with government support but to me this just begs the question as to what happens when a PMB amends the criminal code without the support of the Minister and the Government charged with enforcing the Code? If you think this cannot happen look at the PMB to make all Supreme Courts Justices bilingual which passed the House without government support although it appears to be stuck in the Senate now. (It is not the criminal code but the principle is the same).

My favourite example of how private members' bills can turn the parliamentary process upside down was Liberal Dan McTeague's bill to allow parents to deduct from their income tax up to $5,000 annually contributed to a Registered Education Savings Plan.

The Minister of Finance said the measure could cost up to $900 million a year and would put the country into deficit which he had promised not to do in his 2008 budget.

The bill survived one prorogation, was brought back and was eventually adopted by a vote of 156 - 122 at Third Reading and sent to the Senate. Eight days later the government used a very unusual motion to retroactively stop the bill after it had already passed the House. They introduced a ways and means motion into a completely different bill (C-50 the Budget implementation bill) which specified that the government would not fund the McTeague's bill.

When the motion and C-50 came to a vote the Liberals abstained so as not to force an election. Meanwhile the decapitated bill continued to be debated in the Senate until Parliament was dissolved for the 2008 general election. One can only speculate on the chaos that would ensue if such a practice was repeated on a regular basis

Choosing Chairmen of Committees

Another example of procedures evolving in the wrong way relates to how chairmen of committees are selected.

In November 2002 two seemingly innocuous changes favoured by the Canadian Alliance were adopted in the standing orders. The long standing practice of choosing the Chair of the Public Accounts Committee from the Opposition was codified by putting it in the Standing Orders. The Alliance also wanted all Chairs to be elected by secret ballot.

The compromise reached was that elections would be by secret ballot but the rules would stipulate two committees (public accounts and regulations) which would have opposition chairmen. This seemed like a non reform that merely codified the status quo in a rather clumsy way since the two ideas (secret ballot and designated chairmen) are logically incompatible.

With the advent of minority government three other committees were added to the list that would have opposition Chairs. This was intended to strengthen the committee system by providing greater independence and balance in the chairmanship. In fact it has the opposite effect. It made the chairs more clearly government (or opposition) appointees. Some very negative consequences have flowed from this change.

One is mandate shopping. Another is the increase in the number of appeals to chairmen's rulings. If the opposition cannot get an issue taken up by one committee they can try to transfer it to a committee that has an opposition chairman. The Ethics committee, has become the chosen vehicle for dealing with the most partisan issues since everything can be defined somehow as an ethical issue.

If we really want to elect chairs by secret ballot then we should have real elections. In a minority this could result in all committees being chaired by the opposition. But the more likely result would be a division of labour reflecting the relative strength of the parties and without the present artificial structure.

In the British Parliament a recent report called for the election of committee chairs by the whole house.[12] This was tried for the first time following the change in government last spring. I am not sure we want to go this far. Nor do I like the US system where seniority is virtually the only factor in determining committee chairmanships. But our present system of electing chairs is probably the worst compromise between election and appointment.

Personally I would give the Speaker the task of selecting standing committee chairmen. We do this for Legislative Committees (another reform from the McGrath Committee) but they are rarely used now since there are not enough qualified bodies to man both standing and legislative committees. But I do not see why the chairmen of standing committees could not be chosen by the Speaker from a list submitted by the parties.

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[12] See Reform of the House of Commons Select Committee - First Report , Rebuilding the House: Implementation (Wright Committee), March 10, 2010.

Pushing the Boundaries (The Martin and Harper Years, 2004-2010)

Let us turn to the three minority parliaments and focus more on conventions.

Playing Fast and Loose with the Confidence Convention

When Paul Martin took over as Liberal Leader in 2003 he inherited not only a majority parliament (won by Mr. Chrétien) but also a report by the Auditor General on financial mismanagement.

The sponsorship scandal dominated the 2004 election and the entire Martin minority. In Question Period and in the Public Accounts Committee the opposition made the point, over and over, that the Liberals lacked the moral basis to continue to govern.

The first Martin budget appeared ready to go down to defeat. He then made a deal with the NDP over some additional measures to be included in a second budget implementation bill giving them a combined total of 150 possible votes. The opposition Conservatives and the Bloc had 152 possible votes. With four independent members there was a slim possibility of averting defeat.

The Martin strategy was to avoid an election until the Final Report of the Gomery Commission (scheduled for February 2006). He expected that report would exonerate him personally.

Thus in April 2005 he went on television to address the nation and took the extremely unusual (and desperate) step of promising to call an election within 30 days of the Final Report of the Gomery Commission. The Conservatives were aghast at this idea and decided to use one of their upcoming opposition days to introduce a non confidence motion. Mr. Martin responded by postponing every Opposition Day and went so far as to undesignate an Opposition day which had already been set but on which debate had not yet begun.

This series of events, -- the budget, address to the nation, and the postponement of supply days, set off what has been called "The Curious Case of May 10, 2005" which involved a dispute over what is a confidence vote.

The events that unfolded over the next ten days are rather complex but have been fully discussed in an article by Andrew Heard. [13] The Opposition House Leader moved that a Committee report be concurred in and the Leader of the Opposition moved an amendment that would send it back to committee with an instruction to bring it forward with a recommendation that the government resign.

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[13] Andrew Heard, "Just What is a Vote of Confidence? The Curious Case of May 10, 2005", *Canadian Journal of Political Science*, vol 40 (June 2007)

This led to a procedural debate and eventually a ruling by the Speaker that the motion was in order[14]. A committee report including a non confidence motion did come to a vote on May 10, 2005 and passed by a margin of 153 in favour and 150 opposed.

The government stated that the adoption of such a "procedural motion" did not qualify as a matter of confidence in the government.

After examining the precedents and arguments on both sides some experts concluded that while the wording was convoluted, especially to non-parliamentary ears, the content still clearly implied that supporters of the motion were in favour of the Government's resignation.[15]

The Government did agree to hold a second and "definitive" confidence vote on May 19. It survived but only after inducing Belinda Stronach to defect. The political and tactical fight for survival trumped constitutional convention. The government had clearly lost the confidence of the House and yet failed to resign.

When the House resumed in September the confidence issue was still on everyone's mind. The government again postponed opposition days until mid-November. Timing was critical. If the Opposition parties defeated them in November the election would take place over the Christmas holidays and apparently Liberal strategists thought the public would blame the Opposition for such an unseemly event as a Christmas election.

If the Opposition did not bring down the government before the Christmas adjournment, the Gomery Report would be tabled before an election could be held. A later election would also give the Liberals several additional months to use the apparatus of government to their advantage.

The first opposition day in the fall went to the NDP. It introduced the following very unusual motion on November 17, 2005. It said the Prime Minister should wait until January 2 and then ask the Governor General for an election to be held on February 13, 2006.

Not surprisingly this set off a procedural debate but ultimately the Speaker ruled the motion in order. A number of law professors said there was nothing wrong with a majority in parliament voting to tell the Prime Minister when to call an election. Other experts, including Ned Franks, disagreed. He said "it is the Prime Minister's right and prerogative to go to the Governor General and ask for a dissolution of the House. It is not Parliament's. That is very clear."[16]

The NDP motion carried by a vote of 167 (representing all three opposition parties) to 129. The government took no action arguing that it is logically impossible in our system to declare non confidence and at the same time ask the government to continue in office until a specific future date.

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[14] Canada, House of Commons, *Debates*, May 5, 2005.

[15] Heard, op. cit p. 412. Defenders of the government could argue that it's not a confidence motion because it doesn't say 'confidence,' but according to Ned Franks "it's a pretty serious loss of face" CP, May 5, 2005.

[16] *Hill Times*, November 21, 2005

The end for the Martin government came three days later on an Opposition Day motion by Stephen Harper, that the House has lost confidence in the government. The motion was passed and the election set for January 23 2006, a bit longer than usual to allow everyone to take a week off from campaigning between Christmas and New Years. After months of playing fast and loose with the confidence convention, the Martin government finally did the right thing.

Party Switching

There is nothing new about Canadian MPs switching parties. A study for the House of Commons Ethics Commissioner identified 229 party switches since 1921.[17] However, I think the defection of Belinda Stronach in 2005 and David Emerson a year later added a new dimension to party switching and we need to think about what can be done to prevent such actions in the future.

Belinda Stronach, announced on May 16, 2005 that she was leaving the Conservatives to sit as a Liberal. The following day she was appointed to the cabinet as Minister of Human Resources and Minister Responsible for Democratic Renewal. The May 19 vote on the budget turned out to be a tie with 152 votes for and against. The Speaker cast the deciding vote which in accordance with tradition was to uphold the status quo (i.e. no election). Without the Stronach switch the government would have fallen.

Her move to the Liberal Party and immediate promotion to a senior cabinet position prompted calls from both parliamentarians and the general public for legislation to prevent such "party-hopping." The NDP introduced a bill that would require a by-election to be held within thirty-five days of a party switch. 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. The Ethics Commissioner refused to investigate citing the unfettered right of a Prime Minister to appoint Cabinet ministers.

The re-election of Belinda Stronach as a Liberal in 2006 might have made people forget about floor crossing but for the decision of David Emerson to leave the Liberals and join the Conservative Cabinet just a few weeks after his election as a Liberal in Vancouver Kingsway.

We should not underestimate the damage these two floor crossing have done to the institution or the extent to which they illustrate a kind of "end justifies the means" philosophy usually associated with non democratic or authoritarian states. A sense of self restraint and fair play is one of the underlying principles of a system based on non written conventions. But with so much at stake is it naïve to blame Stronach, Martin, Emerson or Harper for what they did in the circumstances?

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.

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

Without suggesting a return to such a cumbersome process why not adapt that principle to the modern era to restrain members tempted to cross the floor to join cabinet? At least one province (Manitoba) and one Territory (Yukon) have introduced legislation to curb this kind of floor crossing.[18]

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 whomever he wants to cabinet would be unaffected. The law could also make an exception for the special case, very rare in Canada, of coalition governments.[19]

With the prospect of more minority governments in the future the possibility of luring a few extra members across the floor with promises of cabinet posts could become very tempting to a party that is just short of a majority. How many floor crossings would it take to convince an already disaffected public to simply stop believing in the legitimacy of parliament or elections or both?

The Parliamentary Crisis of 2008

There are many who claim the events of December 2008 should not be called a crisis. Our parliamentary institutions worked as they should and the Governor General made the right decision. I do not disagree with that position which has been put forth by some leading experts. However I have sympathy for others who argue that the Governor General only acts on advice that is **constitutional.** A request to prorogue Parliament after 13 days and in the face of a non confidence motion would appear to be very dubious advice.

The crisis started with the Government's Ministerial statement on the economy following the election. The first question to be asked is "How in the world did a Ministerial Statement become a matter of confidence?" Of course, the government can consider anything to be a matter of confidence and that was the clearly the impression given to the other parties. In a more procedural sense we are talking not about the statement itself but about the ways and means motion that would follow.

Such motions must accompany all financial proposals but properly understood a Ways and Means motion 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.

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

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

Faced with an enraged opposition the government backtracked and removed some controversial items from the financial statement. They even said they would not consider the statement to be a matter of confidence. But it was too late.

The Liberals had moved to use the supply day scheduled for Monday December 1 for a non confidence motion. The government, following the Martin precedent, reacted by postponing the opposition day to December 8. Procedurally there was nothing wrong with that but surely we have to ask ourselves if this is the proper way to deal with non confidence motions.

As I have mentioned when Supply days were originally introduced into the rules they were not even votable. We need to set out in the Standing Orders what exactly is a confidence vote, how they will be conducted and get rid of the practice of using opposition days for non confidence motions.

This is not rocket science. In September 2009 the Quebec National Assembly became the first Canadian legislature to codify the confidence convention in its Rules.

In my view there were two important lessons from the prorogation crisis and neither has anything to do with the Governor General and whether she made the right decision.

The first, as I have explained, is that Parliament shot itself in the foot by not having an effective mechanism for dealing with non confidence motions. Even more alarming is that we have made no attempt to fix the problem.

The second lesson relates to the coalition and the possibility that there may no longer be a consensus on one of the most important conventions of the constitution --- who is entitled to form a government. If we do not have consensus then we really do not have any conventions!

Let me give an example of how consensus can evolve or even break down. Immediately after the 1993 election the Reform party (with 52 seats) made the argument that the Bloc (with 54 seats) should not be entitled to the status of Her Majesty's Loyal Opposition because of their pro independence ideology. By constitutional convention, albeit unwritten, the opposition party with the largest number of seats in the House is designated as the Official Opposition. (In case of a tie the Speaker can decide who will be Official Opposition)[20].

There was very little support for the Reform position and when Parliament opened the Speaker did not hesitate in recognizing the Bloc Leader, Lucien Bouchard, as Leader of the Opposition. This was upheld in a subsequent ruling when the numbers were equal.

In 2008 when the Liberals and NDP formed a coalition that normally would have entitled them to form a government the Conservatives argued (1) that only the party that had the most seats was entitled to govern and (2) no party that relied on support from the Bloc was entitled to govern. The latter position in particular appears to have had large support in many parts of the country. Where does that leave us when it comes time to form a government after the next election?

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[20] Canada, House of Commons, Debates, February 27, 1996.

The Fixed Election Date Legislation

The principal impetus for the legislation was the action of Jean Chrétien in 1997 and 2000 when he sought dissolution after only three years in office and at a moment when the main Opposition party was in disarray. The Conservatives said they would make it impossible for future Prime Ministers to act in such an arbitrary way.

Bill C-16 was a very short and simple amendment to the *Canada Elections Act*. It set the date and specifically stated that nothing affected the discretionary power of the Governor General to dissolve Parliament.

The Bill did not attempt to change the constitutional provision establishing the maximum length of Parliament at five years. Nor did it contemplate the very real possibility that the minority government of Stephen Harper would not last the full 45 months until the scheduled election.

Nevertheless the decision to fix election dates was welcomed enthusiastically by those who believe the Canadian Prime Minister has too much power and that parliamentary democracy is well served by checking this power.[21]

Adopted on a voice vote by the House the Bill faced an uncertain future in the Senate where the Liberals held a large majority and seemed prepared to delay indefinitely. They heard from witnesses who were much more critical of the Bill such as David Smith whose critique turned out to be exactly right.

The Act effectively transferred responsibility for setting the election date from the Prime Minister to the Leader of the Opposition. Stephane Dion and later Michael Ignatieff repeatedly spoke against government bills and then abstained from voting to avoid an election. Abstentions are the antithesis of what a parliamentary system is supposed to achieve by fixing responsibility in very clear and obvious ways.

In such an atmosphere it is hardly surprising that parliament became more and more dysfunctional. A former Chief of Staff to Prime Minister Mulroney, Norman Spector, was one of the first to suggest publicly that the government should not feel restrained by its own fixed election date legislation[22]

The Prime Minister came to this view in August 2008 when he met with his caucus to consider the upcoming fall session. He decided to ignore his own legislation. To do this he claimed that Parliament had become unworkable. 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. When he failed to receive such assurances, he declared unilaterally that Parliament had lost confidence in his government and asked the governor general to dissolve Parliament. No vote of confidence took place in the House.

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[21] See for example, Peter Russell, *Two Cheers for Minority Government*, Emond Montgomery Publications Limited, Toronto, 2008, pp. 134-142

[22] See Norman Spector's column in *Globe and Mail* January 4, 2008.

Apologists for the early election likened it to a dentist appointment. If the patient cannot attend he or she simply cancels and makes a new one. This "dental school of governance" did not sit well with many Canadians and the Federal Court was asked to rule on the government's action.

The applicant was Democracy Watch, a public advocacy group. The court found that the Governor General's decision was ultimately political in nature and that judicial scrutiny of such actions would upset the separation between the executive and judicial branches.[23]

The Court also reflected upon another practical difficulty. Suppose a loss of confidence in the House of Commons were indeed a necessary condition for the calling of an early election. The courts would then be in the position of determining when a loss of confidence occurs. There is no commonly agreed-upon definition of "non-confidence"[24] against which a court could make an objective determination. [25]

During the campaign no opposition party promised to revoke the act although afterwards one independent Senator, Lowell Murray brought in a bill that would repeal it.[26] A few Liberal Senators agreed but repeal died on the Order Paper. Thus the fixed date election law remains on the books with the next election to be held in October 2012.

The New Normal

Given the experience of the last few years what should we think about the state of our Parliament? Many experts including Professor Franks and Professor Smith have concluded that despite some obvious problems our system works better in practice than in theory. (That may be true but as they say in the stock market "past performance is not a guarantee of future results)

A long time and respected parliamentarian, Bill Blaikie, had to call upon his previous training as a man of the cloth to explain what has been happening. He said

> "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."[27]

I do not disagree with these assessments but in a system based largely on precedent and unwritten rules we have to be more concerned about bad practices becoming the new normal. I recently offered my condolences to a young committee clerk who had been given one of the most

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[23] For more information on the case see Doug Stolz, Fixed Date Elections, Parliamentary Dissolutions and the Court, *Canadian Parliamentary Review*, vol 13, no. 1, 2010. See also Guy Tremblay, 'The 2008 Election and the Law on Fixed Election Dates,' *Canadian Parliamentary Review*, 31, no. 4 (2008–9). pp. 24-25

[24] See Eugene Forsey, "The Problem of 'Minority' Government in Canada" in Forsey, *Freedom and Order*, Carleton Library, 1974.

[25] Stolz, *op. cit.*

[26] Canada, Senate, *Debates*, January 29, 2009.

[27] Bill Blaikie, Reflections on Reforming Parliament, *Canadian Parliamentary Review*, Vol 31, no. 3, 2008, pp. 3-4

difficult and unruly committees as his first assignment. His response gave me pause because he said "No problem. I thought parliament had always been like this".

Conclusion

Assuming we want a Parliament that is better than what we have experienced recently let me conclude with some changes I would like to see.

Process for reform
An enhanced role for the Speaker
A change in the confidence convention combined with a meaningful fixed election date.

The Process of Reform

One defining characteristics of the 1960s reform was the active involvement of the Speaker. Prime Minister Pearson specifically asked Speaker Alan Macnaughton, to take the lead in dragging the House into the 20th century.

Another successful approach taken by both Mr. Trudeau and Mr. Mulroney was the use of special committees chaired by respected senior members on the government side. Special Committees, have a number of advantages. They can work uninterrupted by other business. They can develop a continuity, independence and expertise.

Jean Chrétien preferred to delegate procedural issues to a committee of the House Leaders. While it might seem logical to leave reform to the House Leaders their real job is managing the day to day business of the House. Putting them in charge of reform is like putting the wolf in charge of the sheep.

Mr. Martin took the unusual step of having the Privy Council Office draft and publish his Action Plan to resolve the Democratic Deficit.[28] I cannot think of a better way to ensure failure than to start from the basis of a document prepared by the Privy Council Office.

Aside from the recent Michael Chong initiative, there has been virtually no interest in parliamentary reform during the years of minority government. Mr. Harper is either ignoring reform (except for the Senate) or following the Chrétien example.

I believe if we want meaningful change we should involve the Presiding Officers. Our Speakership (the four officers who preside) is a vastly underutilized cog in our parliamentary system. They are the only ones whose job encourages them to think seriously about how to improve our House of Commons not just for short term political advantage, but for the long term good of the institution.

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[28] See Peter Aucoin and Lori Turnbull, The democratic deficit: Paul Martin and parliamentary reform, *Canadian Public Administration*, vol 46, no 4, pp. 427-550

An Enhanced Speakership

Whether or not the Speaker is involved in the process I think the rules need to provide for a more prominent role for the presiding officer.

Regarding Question period I have mentioned why I do not think it is possible or perhaps even desirable to go back to an era where the Speaker selects the questions without a list from the party leaders. But why not give the Speaker some discretion over the number of questions and the time allowed. Depending on the ebb and flow of Question Period the Speaker might let an exchange go on for several minutes or he might cut it off.

Similarly it strikes me as very peculiar to have a huge body of precedent that applies to the conduct of the House of Commons but to allow virtually anything under the sun to take place in committee as long as you have a majority of votes. Occasionally Speaker Milliken has called upon committees to behave in a certain way. But that is a long way from applying the same logic that we use in our judicial system and administrative tribunals where lower level judgments are subject to review by a higher level.

There are logistical and procedural problems in moving to a system where appeals in committee could be taken to the Speaker. A simpler solution might be to banish appeals in committee as they have been banned in the House. Combined with a better way to select the Chair that might result in a much better level of work in committee. Either approach would be an improvement over the status quo.

Let me give one final and radical example of what a reformed Speakership could do. Much of the frustration with Parliament comes from the use (or abuse) of time. Time is the currency of Parliament and great battles are fought over how the time of the House will be spent. We have never reconciled in a practical way the Opposition's right to oppose and the government's right to govern."

Is it really necessary to have 20 or 30 speeches on second reading of a bill when all the arguments have been exhausted after the first two or three speeches from each side? In Britain they limit the speeches on a bill at second reading.

I would like to see a procedure whereby there is a speech or two by each party on the substance of a bill at second reading. Then there would be a speech by each House Leader setting forth how much additional time he thinks the bill would require at second reading (and perhaps even in committee). Obviously the government would argue that every bill must be passed quickly. The opposition would say every bill requires long and detailed study. In the end it would be up to the Speaker to choose one of the proposed timetables. This would resemble a salary arbitration in baseball where the agent for the money grubbing star player presents one figure and the penny pinching general manager presents another. The arbitrator listens to the arguments and then must choose one or the other. If either is unreasonable each risks losing everything.

I think such an approach would go a long way to improving debate in Parliament and getting

focus back on the substance of issues. Instead we seem to alternate between unending dilatory tactics in a minority situation and the arrogant use of time allocation in majority ones.

A Confidence Convention for the 21st Century

When first explained the confidence convention impressed me as the most sophisticated governance device ever devised by mankind. Unfortunately the way we have been using it has not been very sophisticated and not amenable to good governance.

- Should the vote on the Throne Speech, usually containing nothing but generalities, be a matter of confidence?

- Must the debate on the budget necessarily be a matter of confidence? If Parliament does not like the budget should the government should get a second or third chance to come up with an acceptable budget before an election is called?

- Why should defeat of a government bill, even a major one be a matter of confidence?

- Why should the government decide which measures are matters of confidence and which are not?

If we want to change any of these things I think we should examine a recent British proposal that would establish a fixed election date and also change the way the confidence convention works.

Their legislation sets a five year schedule for elections but outlines two ways in which an election can be triggered before the end of a five-year term.

First, an early election can occur if there is a vote of at least two-thirds of the House.

Second if a motion of no confidence is passed and a new government cannot be formed within fourteen days Parliament will be dissolved and a general election will be held.

The British Bill authorizes the Speaker of the House to issue a certificate declaring that a vote of no confidence in the government has been passed and certifying that a new government cannot be formed.

In my view this proposal is a move away from the Westminster Model and toward a more continental system of governance. I am not sure if the British need such a change but in light of recent events in Canada I think that we do.

Since I cannot foresee out parliamentarians coming up with such a proposal I would support the idea of a Royal Commission on Constitutional Conventions as suggested by David Smith.[29]

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[29] See David Smith, *The People's House of Commons*, University of Toronto Press, Toronto, 2007, p. 140.

I think that body should also carefully consider a suggestion by Peter Russell[30] that we adopt a New Zealand style cabinet manual[31] which outlines the basic rules of governance. The cabinet manual is not a constitutional document but is a public document and it seems to me it would have an important educational function if not a legal one.

As part of its mandate I think such a commission should look at the whole area of parliamentary privilege and how it operates in the age of the Charter.

The Cost of Dysfunction

This is an event for people interested in public policy and not a study of parliament conference. You have been very patient in listening to all these process issues that we take so seriously in Ottawa. But let me state briefly why I believe parliamentary reform is important from a public policy perspective.

First, unless we are able to make our institutions work better than they have in the last three minorities I think we risk seeing a governance issue transformed into a national unity issue. I was not one who thought the 2008 prorogation crisis might have developed into another King-Byng constitutional crisis as we had in 1926. I feared something closer to what happened in the 1850s when successive elections produced deadlock because political leaders of the day failed to make the institutions work. Only after many years of chaos and with help from the British and from Nova Scotia and New Brunswick did a new entity emerge with different and more viable institutions.

We have muddled along ever since and I am sure that most Canadians have developed an "it cannot happen here" mentality with regard to a future government breakdown. But if we cannot govern ourselves effectively some parts of the country will conclude that they are better off governing themselves.

Another public policy consideration is that without effective institutions of governance we will be unable to compete with China and other countries who are unburdened by some of the restraints we put on ourselves.

I am not suggesting we adopt the Chinese model. But I think there is an important lesson we can learn from China. A friend of mine returned from a recent trip following the old Silk Road across China. He was struck not only by what great strides China has made but also by how a great civilisation could have forgotten how to do the things that made it great.

We have only a few hundred years of history compared to thousands for China but I hope we are not in the process of forgetting how Parliamentary Government is supposed to work.

I look forward to your comments and questions.

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[30] See Peter Russell, Minority Government and Constitutional Convention, *Canadian Parliamentary Review*, vol 33, no 2, Summer 2010, p.15

[31] See www.cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf